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THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

MARCUS D. BEGLEY,

ONE OF HIS MAJESTY'S COUNSEL.

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CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND.

POE v. GILLEN (1).

C.A. 1933.

Oct. 17. Nov. 21.

Will—Construction—Bequest of the use of portion of a farm to M. for life, followed by a gift of the farm to P. and F.—Incumbrance Sub-division without the consent of the landlord in writing—Land Law (Ireland) Act, 1881 (44 & 45 *Vict.*, *c.* 49) *sections* 2, 3, 30—*Landlord and Tenant Act* (*Ireland*), 1860 (23 & 24 *Vict.*, *c.* 154), *section* 10.

B.G., who was the father of P., the defendant, and of M., the respondent, left by his will "to my daughter, M., the use of the field "of land at the lime kiln during her life, and also one acre of ground "for her use for the same period, and a sufficient area of ground in "the garden to grow each year a sufficient supply of cabbage plants "for her own use." He also left "to my sons, P. & F., in equal "portions, my farm of land."

The devise to P. & F. of the testator's farm of land included the portions set apart for M.'s use during her life, which were to be equally divided between P. & F. at her death.

He also bequeathed to his son F. the room and upstairs of the house (slated) he was residing in, and to his daughter M. he bequeathed the kitchen and upstairs of the house he was residing in, after which it was to become the property of his son F., and he ordered that, with the exception of the stable, which he bequeathed to his daughter M. during her life, afterwards reverting to his sons, P. & F., all the out-offices be equally divided between his two sons, P. & F.

F. assigned his interest in the lands to the defendant P. on 13th December, 1919.

(1) In the Court of Appeal before Andrews and Best, L.JJ.

C.A.
1933.

POE
v.
GILLEN.

The defendant having become indebted to the plaintiff in the sum of £30 3*s.* 0*d.* for rent, the plaintiff entered up judgment in the King's Bench Division for that sum, together with costs. The judgment was registered as a judgment mortgage over the defendant's interest in the farm. The plaintiff brought an equity civil bill to have the amount of the judgment mortgage declared well charged on the defendant's lands, and the County Court Judge directed an inquiry as to what incumbrances affected the lands.

The Acting Clerk of the Crown and Peace found by his certificate that the gift to M. constituted a burden on the lands.

The plaintiff brought a motion before the County Court Judge to vary the certificate by omitting the burden in favour of M. The County Court Judge refused the motion.

The plaintiff appealed to the Judge of Assize who held that the bequest constituted a sub-division without the consent of the landlord in writing and came within section 2 of the Land Law (Ireland) Act, 1881, and that consequently it was null and void, but stated a case for the opinion of the Court of Appeal.

Held, by the Court of Appeal (Andrews and Best, L.JJ.), that the finding that the bequest in favour of the respondent M. was an incumbrance affecting the lands was right in point of law;

Held, also, that section 2 of the Land Law (Ireland) Act, 1881, which forbids tenants from year to year of tenancies to which the Act applies from sub-dividing their holdings without the consent of the landlord, applies to sub-divisions by will as well as to sub-divisions by assignment *inter vivos*;

Held, further, that the effect of sections 2 and 3 of the Land Law (Ireland) Act, 1881, when read together, is that sub-divisions by will, as distinguished from attempted sub-divisions *inter vivos* which are absolutely void (*Fogarty v. Shannon* [1896] 2 I.R. 273) are not rendered null and void as between the various parties claiming under the will, but confer upon the landlord the right to require a sale of the tenancy in the event of the personal representatives of the testator failing to nominate one of the legatees to succeed to the tenancy.

CASE STATED by Brown, J., as Judge of Assize, on appeal from a decision of the County Court Judge of Tyrone.

The Case Stated was as follows:—

"This case came before me at the Spring Assizes, 1933, for the county of Tyrone, on an appeal by Mary Gillen against an Order of His Honour the County Court Judge of Tyrone refusing to vary a certificate of the Acting Clerk of the Crown and Peace and dated the twelfth day of January, One thousand nine hundred and thirty-three. I adjourned the case to Belfast, in order to allow counsel to look more fully into the

law, when it was argued before me on the 16th day of June, 1933.

"The defendant Peter Gillen is the owner of a farm of land and premises in the townland of Broughderg, in the barony of Upper Dungannon, and county of Tyrone, formerly held by the defendant under the plaintiff as a tenancy from year to year but now subject to the compulsory provisions of the Northern Ireland Land Act, 1925.

"The defendant having become indebted to the plaintiff in the sum of £30 3*s.* 0*d.* for rent, the plaintiff on the 7th day of March, 1932, entered up a judgment in the King's Bench Division of the High Court of Justice in Northern Ireland, for that sum together with £8 13*s.* 9*d.* for costs, making together the sum of £38 16*s.* 9*d.* That judgment was registered as a judgment mortgage over and against the defendant's estate and interest in the said farm and premises on the 22nd day of April, 1933.

"On the 16th day of August, 1932, the plaintiff brought an equity civil bill to have the amount of the said judgment mortgage declared well charged on the lands of the defendant, and the learned County Court Judge made the usual Order on the 9th day of November, 1932, which directed an inquiry as to what incumbrances other than the plaintiff's affected the said lands.

"Bernard Gillen, who was the father of the defendant and of the respondent, left by his will, to which I refer, 'to my daughter, Mary, the use of the field of land 'at the lime kiln during her life and also one acre of 'meadow for her use for the same period, and a 'sufficient area of ground in the garden to grow 'each year a sufficient supply of cabbage plants for 'her own use.' He also left 'to my sons, Peter 'and Francis, in equal portions my farm of land.' Francis Gillen assigned his interest in the said lands to Peter Gillen on the 13th December, 1919, for £150.

"By his certificate to which I refer, dated 1st December, 1932, the Acting Clerk of the Crown and Peace held that the aforesaid gifts to Mary constituted a burden on the said lands.

C.A. 1933.

POE v. GILLEN.

"The plaintiff brought a notice of motion to which I refer before the learned County Court Judge to vary the said certificate by omitting therefrom the said burden in favour of Mary Gillen on the grounds that the said bequest was null and void being a sub-division of the holding within the meaning of the Land Law (Ireland) Acts, without the consent of the landlord. On the 12th day of January the learned County Court Judge refused the said motion, and it is from this decision that this appeal is taken.

"I held that the said bequest was a sub-division without the consent of the landlord in writing and came within section 2 of 44 & 45 Vic., c. 49, and that consequently it was null and void.

"The question now stated for the opinion of the Court is whether the Acting Clerk of the Crown and Peace was correct in finding that the devise in favour of Mary Gillen is an incumbrance affecting the said lands."

Black, K.C., and *McSparran* for the respondent, Mary Gillen:—

The question is whether the bequest effected a sub-division. We contend that the dispositions made by the will in favour of Mary Gillen do not amount to sub-division. The rights conferred upon her were mere personal enjoyments in the lands incapable of assignment, and they did not confer any estate in the lands upon her.

Even if the provisions of the will did amount to sub-division, we submit that Brown, J.'s conclusion is entirely unfounded in law.

The right to grow cabbage plants certainly did not amount to sub-division, as no right of ownership was given. It was something like a right of conacre which has been held not to amount to sub-division.

The right to graze in common any cow or calf cannot amount to sub-division, such a right is something in the nature of a profit *à prendre*.

We rely on *Reay v. Rawlinson* (1), where it was

(1) 29 Beav. 88.

held that a gift of "grass for a cow" in a field only created an easement.

To keep any cow that the respondent may select on the land does not create a sub-division.

All that is intended by these dispositions is personal enjoyment by Mary Gillen. All that was created was a personal right.

We rely on *Edwardes v. Barrington* (1). There, the lessee of a theatre granted to a refreshment contractor "the free and exclusive licence and right to the use "of all the refreshment bars, smoking rooms, wine "cellars, and offices" in the theatre, together with the free right of access thereto, and also the sole and exclusive right of advertising therein, for a term of years at a fixed rent.

It was held by the House of Lords affirming the judgment of the Court of Appeal in England, that the effect of the document was to grant a licence under which the refreshment contractor took no estate or interest in the property, and therefore it did not amount to a breach of a covenant in the lease not to assign without the consent of the lessor.

Even if the will conferred an estate in the lands upon the respondent, this did not amount to a sub-division within section 2 of the Land Law (Ireland) Act, 1881. We submit that this section applies only to sub-division effected by assignment *inter vivos* and does not apply to such dispositions as are contained in this will, which come under section 3 of the Act.

If the result of the devise was to effect a sub-division, and if that sub-division was null and void, it must be null and void in all, and not in some only, of its parts. The defendant is interested under the same will as that under which the respondent claims. The dilemna is inescapable. The plaintiff as judgment mortgagee can have no higher rights in the land than her judgment mortgagor. *Eyre v. McDowell* (2).

Murphy, K.C. (with him *Long*), for the plaintiff:—

This case is to be decided on the document before the Court.

(1) 85 L.T. 650. (2) 9 H.L.C. 619.

C.A. 1933.

POE v. GILLEN.

As to the effect of section 2 of the Land Law (Ireland) Act, 1881, we rely on the words used by Holmes, J., in *Fogarty v. Shanahan* (1), where he said, "the policy "of the section is that a holding is not to be sub-divided "against the will of the landlord ; and, in the absence "of some power enabling the landlord to take active "steps, the best mode of securing the object aimed at "is to make legal sub-division impossible. This, I think "is what the statute declares. Anything amounting "to sub-division is an illegal act, and is therefore null "and void to all intents and for all purposes." This language is perfectly precise. These words, we submit, are perfectly general. Section 2 cannot be confined to sub-division effected by assignment *inter vivos*, it is perfectly general in its terms.

There is nothing in section 2 of the Land Law (Ireland) Act, 1881, the word used being "sub-divide," which confines it to assignments *inter vivos*. It differs from section 10 of the Landlord and Tenant Act (Ireland), 1860, where the word "assignment" is used, a word which was held in *Foley v. Gallagher* (2), to comprise acts *inter vivos* only.

That the word "sub-divide" applies to devises and bequests appears from the following illustration of its meaning in the Oxford Dictionary, "All tenants "should be allowed to sub-divide their holdings "amongst their relatives."

We submit that the language of the will is perfectly precise and clearly establishes sub-division.

The bequest of the use of the field of lands at the "lime kiln during her (Mary's) life" certainly effected sub-division. This was a portion set apart.

We rely most strongly on the bequest to the respondent of "the kitchen and upstairs thereof of "the house I am at present residing in," as constituting sub-division. There was no property in the brothers as regards this portion during the respondent's lifetime.

Edwardes v. Barrington (3) is of no assistance to the Court on account of the extraordinary difference

(1) [1896] 2 I.R. 273, 285.
(2) 2 L.R.I. 35, 389.
(3) 85 L.T. 650.

between the document in that case and in the present. *Reay v. Rawlinson* (1) is not of very much assistance.

Section 3 of the Act of 1881 does not take the present case out of the operation of section 2. Section 3 operates to cut down the effect of section 2.

It was never considered in *O'Regan v. White* (2) whether section 2 applied to acts *inter vivos* or by operation of law.

Black, K.C., in reply:—

In the passage already referred to from Holmes, J.'s judgment in *Fogarty v. Shanahan* (3), Holmes, J. was simply directing his attention to assignments *inter vivos*.

In his judgment in *O'Regan v. White* (2), Ronan, L.J., points out the word "sub-divide" is used in the Act of 1881.

Admittedly in the Act of 1860 the word assignment only applies to assignments *inter vivos*.

The respondent cannot be ousted by an argument which denies his rights in the lands, when if that argument were good it would have to be admitted that the plaintiff himself had no such rights.

Cur adv. vult.

ANDREWS, L.J.: Bernard Gillen, who was the father of the defendant Peter Gillen and the former owner of a tenancy from year to year in the lands which are the subject matter of this judgment mortgage suit, made his will on 28th March, 1911. He bequeathed to his daughter Mary "the use of the field of lands at the "lime kiln during her life and also one acre of meadow "for her use for the same period." He also "ordered "that she be allowed a sufficient area of ground in "the garden" for growing each year cabbage plants for her own use. He directed that his sons, Peter and Francis, should do all necessary horse work for her free of charge, and should cut and draw turf for her, and he made certain provisions in her favour in

(1) 29 Beav. 88.
(2) [1919] 2 I.R. 339, 379.
(3) [1896] 2 I.R. 273, 285.

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ANDREWS, L.J.

regard to a cow and its calves, including a right to have them grazed in common by his said sons. He also directed that she should be permitted to keep a sufficient number of fowl for her own use, and conferred certain rights upon her in respect of seed potatoes and seed corn. Next followed a bequest to his said sons, Peter and Francis, in the following terms :—" I give " and bequeath to my sons, Peter and Francis, in equal " portions my farm of land (including the portions set " apart for my daughter Mary's use during her life " which are to be equally divided amongst my sons, " Peter (the defendant), and Francis, at her death) " now in my possession." He bequeathed to his son Peter the room and kitchen known as " the lower " house ; " to his son Francis " the room and upstairs " thereof of the house (slated) in which I am at present " residing ; " and to his daughter Mary " the kitchen " and upstairs thereof of the house I am at present " residing in after which it is to become the property " of my son Francis." Finally, he " ordered " that, " with the exception of the stable which I give and " bequeath to my daughter Mary during her life " afterwards reverting to my sons Peter and Francis, " all the out-offices be equally divided between my " two sons Peter and Francis aforesaid."

The testator died on 9th July, 1911 ; and probate was duly granted on 30th August, 1912.

All parties appear to have entered into full enjoyment of their respective rights under the will and to have so remained until 13th December, 1919, when Francis assigned his interest in the lands to the defendant, Peter, for the sum of £150. No further change has since taken place.

The case stated finds that " Peter Gillen is the owner " of the farm of lands and premises " which is " now " subject to the compulsory provisions of the Northern " Ireland Land Act, 1925."

The defendant became indebted to the plaintiff in the sum of £30 3*s.* 0*d.* for rent. For this sum the plaintiff obtained judgment together with £8 13*s.* 9*d.* costs ; and this judgment was on 22nd April, 1932, registered as a judgment mortgage against the

defendant's estate and interest in the said farm and premises on 22nd April, 1932.

The present proceedings were instituted on 16th August, 1932, by equity civil bill to have the amount of the judgment mortgage declared well charged on the lands of the defendant. The County Court Judge made the usual order on 9th November, 1932, directing an inquiry as to what incumbrances affected the said lands. By his certificate, dated 1st December, 1932, the Acting Clerk of the Crown and Peace held that the incumbrances included first in priority a " burden " which consisted of the aforementioned " rights " in favour of Mary Gillen under her father's will. The plaintiff thereupon brought a notice of motion before the County Court Judge to vary the certificate by omitting therefrom the said burden in favour of Mary Gillen on the grounds that the said bequest was null and void, being a sub-division of the holding within the meaning of the Land Law (Ireland) Acts without the consent of the landlord. On 12th January, 1933, the County Court Judge refused the motion ; and it was from this decision that the appeal was taken to Mr. Justice Brown, who held (subject to this Case Stated) that the bequest was a sub-division without the consent of the landlord in writing ; and that it came within section 2 of 44 & 45 Vict., C. 49, and consequently was null and void. The question stated for the opinion of this Court is whether the Acting Clerk of the Crown and Peace was correct in finding that the devise in favour of Mary Gillen is an incumbrance affecting the said lands.

Mr. Black's argument on behalf of Mary Gillen was twofold in character. In the first place, he submitted that the rights conferred upon her were mere personal enjoyments in the lands incapable of assignment ; that they did not confer any estate in the lands upon her ; and, accordingly, that they did not effect any sub-division of the lands. In support of this argument he relied upon *Reay v. Rawlinson* (1), in which it was held that a gift of " grass for a cow " in a field created a mere easement. In my opinion this argument is

(1) 29 Beav. 88.

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sound in regard to certain of the gifts, such as the allowance of an area of ground in the garden in which to grow cabbages for her own use, and the permission to keep a sufficient number of fowl for her own use. On the other hand, I am unable on the authorities to hold that no estate was conferred upon her by the bequest of the use of the field of land at the lime kiln during her life and the acre of meadow for her use for the same period. It has been held that a devise of "the free use" (*Cook v. Gerrard*) (1), or of "the use "and occupation" of land (*Welcden v. Elkington*) (2), passes an estate in the land, and consequently a right to let or assign it, and that it is not confined to the personal occupation of the property unless, as, for example, in the case of *Maclaren v. Stainton* (3), the context clearly calls for the more limited construction. In my opinion there is no context here which compels the more limited construction. Indeed, such a construction would be entirely at variance with the terms of the gift to Peter and Francis which (as above-mentioned) is stated to include "the portions set apart "for my daughter Mary's use during her life which "are to be equally divided amongst my sons Peter "and Francis at her death." The same must also be said of the gift of the kitchen and upstairs portion of the house, which, apparently, at Mary's death, "is "to become the property of my son Francis." For these reasons I am of opinion that Mr. Black's first argument fails.

In the second place, he contended that, even if the will conferred an estate in the lands upon Mary, this did not amount to a sub-division of the lands within section 2 of the Land Law (Ireland) Act, 1881. This section, which provides that a tenant shall not sub-divide his holding without consent, applies, as he submitted, only to sub-division effected by assignment *inter vivos*, and that it has no application to a bequest to more than one person or to an intestacy which falls within section 3 of the Act. In answer to this, Mr. Murphy argued that there is nothing in section 2, where the word used

(1) 1 Wms. Saund, 180, 186.
(2) 2 Plowd 516, 524.
(3) 27 L.J. Ch. 442.

is "sub-divide," which confines it to assignments *inter vivos ;* and that in this it differs from section 10 of Deasy's Act, where the word used is "assign"—a word which the Court of Appeal in *Foley v. Gallagher* (1), considered pointed solely to gifts *inter vivos.* Mr. Murphy also referred us to the use of the word "sub-" divide" in the Oxford Dictionary in the quotation :— "All tenants should be allowed to sub-divide their "holdings amongst their relatives" as showing that it properly applied to bequests. In my opinion, however, the Act contains its own dictionary, and a much more powerful argument lies in section 30 (1) (*d*), which contains one of the conditions annexed to holdings whilst subject to advances made by the Land Commission. This condition opens with the words :— "Where on the decease of the proprietor the holding "would by reason of any devise, bequest, intestacy, "or otherwise become sub-divided . . ." It is impossible in the face of this section in the same Act of Parliament to contend that a devise or bequest in a will cannot effect a "sub-division." Mr. Black's argument is accordingly, in my opinion, too wide, but I arrive at the result for which he contends in another way. He regards sections 2 and 3 as having a wholly different subject matter and as being mutually exclusive of one another. My opinion, on the other hand, is that all sub-divisions, whether by assignment *inter vivos,* will, or intestacy, fall within section 2 and are thereby forbidden. At the same time the section does not in terms declare them null and void ; but, as no other section applies to assignments *inter vivos,* it was in my opinion properly held (in *Fogarty v. Shanahan* (2),) that in such cases the assignment is null and void. On the other hand, a sub-division effected by will or intestacy falls also within the second paragraph of section 3, which operates in such cases to cut down or qualify what would otherwise be the effect of section 2. Section 3 prescribes a procedure which may be resorted to with a view to avoiding the evil against which the legislation was directed—the undue multiplicity of tenants, with

(1) 2 L.R.I. 35, 389. (2) [1896] 2 I.R. 273.

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consequent difficulties in the collection of rents. This procedure enables the personal representatives to serve notice on the landlord nominating one of the persons entitled to succeed to the tenancy, in which case such person has the same claim to be accepted by the landlord as if the tenancy had been sold to him. In default of such notice the personal representatives shall, if the landlord requires a sale, sell the tenancy, and in case of their default the landlord may himself sell.

All of these provisions are, however, merely enabling provisions to the landlord. They confer upon him rights if he chooses to exercise them. They are, in my opinion, based on the assumption that the sub-division is not null and void. The section appears to me, whilst protecting the landlord, to preserve the rights and equities of the persons beneficially entitled under the will or intestacy *inter se*. To hold otherwise would be in effect to confer upon the personal representatives of a deceased tenant the power to make a new will for their testator by virtue of the right of nomination which the section vests in them. This view is confirmed by Rule 121 of January, 1897 (Cherry, p. 747), under which, when a sale by the landlord is directed by the Court, it may "direct "all proper persons to concur in the assignment," and the purchase money is paid into Court "to abide "such order as the Court shall think fit to make "regarding it." Such provisions constitute, in my opinion, a clear recognition of existing rights and equities created by the "sub-division," and are repugnant to the view that it was absolutely null and void *ab initio*.

It seems to me that there was much wisdom in the Legislature differentiating between sub-division by assignment *inter vivos* and sub-division by will or intestacy. In the former case the transaction may without difficulty or embarrassment be declared absolutely null and void; for, whilst the parties are alive, the matter can be restored *in statu quo* without any real injustice being effected. On the other hand, where a sub-division has been created by will or

intestacy, the tenant is dead, and nothing can be done to place matters again in the position in which they formerly were.

If it be urged that it is impossible to give to the words "shall not sub-divide" in section 2 a different construction in the case of a will or intestacy from that which they bear in the case of an assignment *inter vivos*, I would reply that such an argument is based on the fallacy that section 2 alone applies to both cases. Section 3 prescribes in express terms the consequences of a sub-division by will or intestacy, whilst no consequence is prescribed in the Act for an infringement of the prohibition against sub-division by assignment. The importance of this distinction is apparent from the judgment of Holmes, J., in *Fogarty v. Shanahan* (1), in which it will be observed that he based his conclusion as to the sub-division by assignment being null and void on the fact that the statute had declared that "a person shall not do a thing, "*without prescribing the consequences of his doing it.*"

In conclusion I must refer to the argument of Mr. Black as to the effect of Mr. Justice Brown's decision. If, he says, there was a sub-division, and if that sub-division was null and void, then it must be null and void in all, and not in some only, of its parts. With this I entirely agree. There is, in my opinion, no justification in legal principle for holding that, though the bequest of the smaller part in the sub-division is bad, that of the larger part is not only good, but, indeed, in some mysterious way has become enlarged or enhanced by the accretion thereto of the smaller share. The defendant, Peter Gillen, who is, as I have stated, referred to in the Case Stated as "the owner" of the land and premises, became jointly interested with his brother Francis under the same will as that under which Mary Gillen claims. Subsequently, he became assignee of the interest of Francis. I am quite unable to hold that these bequests to Peter and Francis (which incidentally effected a sub-division between themselves) were good whilst the bequest to Mary is bad. The defendant Peter would not be allowed so to

(1) [1896] 2 I.R. 273, 285.

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contend. He would not be permitted to approbate and reprobate; and the plaintiff as judgment mortgagee—and it is in this capacity that she sues—can have no higher rights in the land than her judgment mortgagor, *Eyre v. McDowell* (1). She must take *cum onere* or not at all.

In my opinion, therefore, we should answer the question submitted to us by saying that in our opinion the Acting Clerk of the Crown and Peace and the learned County Court Judge were correct in finding that the devise in favour of Mary Gillen is an incumbrance affecting the said lands.

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BEST, L.J.: The question for decision in this case is whether the finding of the Acting Clerk of the Crown and Peace for County Tyrone, confirmed as it is by the learned County Court Judge, that a bequest in favour of Mary Gillen is an incumbrance affecting the lands the subject matter of the suit, is right in point of law, or whether, as found by the learned Judge who states the case, the said bequest was a sub-division without the consent of the landlord in writing and came within section 2 of 44 & 45 Vict., c. 49, and was and is consequently null and void.

Bernard Gillen, by his will dated the 28th day of March, 1911, gave and bequeathed to his daughter, Mary, the use of the field of land at the lime kiln during her life and also one acre of meadow for her use for the same period. He also ordered that she be allowed a sufficient area of ground in the garden to grow each year a sufficient supply of cabbage plants for her own use. There was a direction that testator's sons, Peter and Francis, should do each year work for the said Mary in connection with the cutting and drawing of turf, there was a bequest of a cow to her with the right to keep the calves of such cow as directed, and there were provisions in the will as to the keeping by Mary of fowl and as to the supply in certain events of seed potatoes and seed corn. Testator gave and bequeathed to his sons, Peter and Francis, in equal portions his farm of land, including the portions set

(1) 9 H.L.C. 619.

apart for his daughter, Mary's, use during her life, which were to be equally divided amongst his said sons, Peter and Francis, at her death. He also bequeathed to his son, Francis, the room and upstairs thereof of the house he was residing in, and to his daughter, Mary, he bequeathed the kitchen and upstairs thereof of the house he was residing in, after which it was to become the property of his son, Francis, and he ordered that, with the exception of the stable, which he bequeathed to his daughter, Mary, during her life, afterwards reverting to his sons, Peter and Francis, all the out offices be equally divided between his two sons, Peter and Francis aforesaid.

Mr. Black for Mary Gillen submits that there has been no sub-division of the holding in favour of Mary, that the provision in respect of the use of the field of land at the lime kiln and also of the acre of meadow is not different in kind from the other advantages conferred upon her, and that, reading the will as a whole, it is clear that no estate in the said lands or in the portions of testator's residence in which rights were given to Mary was conferred upon her. He further submits that, even if there be sub-division, section 2 has no application, as it only prohibits sub-division by act *inter vivos* and does not apply to cases of sub-division created by will or arising under an intestacy.

I am unable to accept either of his submissions. It appears to me that an estate for life in the field of land at the lime kiln, in the acre of meadow, in the kitchen and upstairs thereof of the house in which testator was residing at the date of his will, and in the stable, was conferred upon Mary. She is given the use of the fields for her life, and it is only upon her death that the portions set apart by testator for her use during her life are to be equally divided between Peter and Francis. "The kitchen and upstairs "thereof" of testator's residence cannot, in my opinion, be placed on a different footing from the fields, and as to those apartments, they are to become the property of testator's son, Francis, after the bequest to Mary. Indeed, the bequest of these apartments to Mary, if not qualified by the words "after which it

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"is to become the property of my son, Francis," would, I think, have conferred upon her testator's entire interest in them. The stable is given to Mary during her life and is afterwards to revert to Peter and Francis. Testator possibly contemplated that Mary would personally reside in the house and personally use the lands during her life, but there was no gift over if she failed to do either of these things, and in my opinion, by these bequests to Mary, he has sub-divided the holding if under section 2 of the Act sub-division can be effected by will as well as by act *inter vivos*.

But Mr. Black submits that, even if testator did by these provisions of his will purport to sub-divide the holding, the section has no application to the case.

The words of that section are in my opinion wide enough to cover cases of sub-division created by will or arising under an intestacy. The section provides that the tenant from year to year of a tenancy to which the Act applies shall not, without the consent of the landlord in writing, sub-divide his holding or sub-let the same or any part thereof. The provisions of the section itself are, I think, wide enough to cover every case of sub-division, whether by act *inter vivos* or otherwise, which is effected without the consent in writing of the landlord, but the matter is placed beyond doubt by reference to the provisions of section 30 (1) (*d*) of the Act. That sections deals with the conditions annexed to holdings whilst subject to advances, and one of the conditions as set forth in (1) (*d*) is as follows:—"Where, on the decease of the proprietor, "the holding would by reason of any devise, bequest, "intestacy or otherwise, become sub-divided, the "Land Commission may" require certain steps to be taken. This shows clearly that sub-division may be effected by will or under an intestacy as well as by act *inter vivos* and that the limited construction proposed to be put upon the section cannot be sustained.

I am accordingly of opinion that there is nothing in section 2 confining its application to sub-division by acts *inter vivos*, and that sub-divisions of every kind effected without the consent of the landlord in writing are prohibited.

If under section 2 sub-division, including sub-division by will or on an intestacy, be prohibited, how can these provisions be reconciled with those of section 3? This section allows a tenancy which is sub-divided by the will or upon the intestacy of the tenant to devolve upon some one of the legatees or persons entitled under the Statutes of Distribution if the steps indicated by the section are taken, and to this extent gives relief from the prohibition against sub-division contained in section 2.

There is no inconsistency between the two sections. In section 2 all sub-divisions without the landlord's consent in writing are prohibited, and as there is no other section in the Act saving assignments *inter vivos*, it was held in *Fogarty v. Shanahan* (1), by the Queen's Bench Division and by the Court of Appeal that these assignments are null and void. Section 3, however, relieves against sub-divisions effected by will or upon an intestacy if the steps indicated in the section are carried out, and if there had been no such section, it would have followed that a tenant's interest in his holding would have been liable to forfeiture by his failure to make a will or by his making a will in which he proposed to divide his holding amongst such beneficiaries as he might select. It was pointed out by Holmes, J., in the case just cited at p. 285, which was one of assignment *inter vivos*, that as section 2 forbade such an assignment without prescribing the consequences of carrying it out, it was an illegal act and therefore null and void to all intents and for all purposes.

Upon the death of Bernard Gillen, the testator, his sons, Peter and Francis, would appear to have entered upon the holding in accordance with the terms of the will and to have enjoyed their divided shares, and in 1919 Francis assigned his share to Peter, who seems to have been accepted as tenant of the holding, and is stated in the case to be the owner of it. If, as I hold, Bernard Gillen's will created a sub-division as regards Mary's portion, it equally created a sub-division of the holding between Peter and Francis, who, subject

(1) [1896] 2 I.R. 273.

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to Mary's rights, took the lands equally. Whether, and if so, when, the landlord of the holding, who is also a judgment mortgagee over Peter's interest in it, was made aware of the contents of the will does not appear, but this Court will not assist her in an attempt to deprive Mary Gillen of her rights under her father's will because it is alleged that those rights are conferred in contravention of section 2 of the Act, and at the same time allow her (the landlord) the advantage of capturing the interest of Francis as well as that of Peter conferred by the same will in contravention of the same section. More than twenty-two years have elapsed since the death of Bernard Gillen in July, 1911, the landlord has taken no steps to enforce her rights as to the sale of the holding given by section 3 of the Act, she has acquiesced during all that time in the state of affairs created by this will, and it would be inequitable to use section 2 of the Act to deprive Mary Gillen of her rights and at the same time, in spite of that section, to increase Peter's interest in the holding, which is all that the judgment mortgage captures.

I am accordingly of opinion that the Acting Clerk of the Crown and Peace and the learned County Court Judge were right in finding that the bequest in favour of Mary Gillen is an incumbrance affecting the said lands.

Solicitors for the plaintiff: *Venables, Byers & McGarvey.*

Solicitor for the Incumbrancer, Mary Gillen: *E. J. Malone.*

J. McC.

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Nov. 16, 21. 1934. Jan. 18.

Workmen's Compensation—Employer and Workman—Accident arising out of employment—Workman injured while proceeding along road after having turned or "kopped" cattle and at moment of accident turned in direction of footpath—Workmen's Compensation Act (Northern Ireland), 1927, 17 & 18 *Geo.* 5, *c.* 16, *section* 1.

A workman's duties included the carrying of milk to his employer's customers.

On 19th November, 1932, he left the hotel with a can of milk to be delivered to one of the customers. On his way he had to cross the road, and when he was in the "middle" or "centre" of the road, he helped a woman to turn or "kop" some straying cattle, and after having done so, and as he was turning towards the footpath, he was struck by a cyclist and died as the result of his injuries.

Held, by the Court of Appeal (Andrews and Best, L.JJ.), that the accident arose out of and in the course of the employment.

An Appeal by the applicant from an order made on 13th May, 1933, by the Acting County Court Judge of County Antrim, dismissing the claim of the applicants for compensation in respect of the death of Joseph Hanna who was in the employment of the respondents, and who died as the result of an accident which took place on 19th November, 1932.

Joseph Hanna was in the service of the Adair Arms Hotel, Ballymena, owned by the respondents. His duties included the carrying of milk to the respondents' customers.

On 19th November, 1932, he left the Adair Arms with a can of milk to be delivered to one of the customers. It was proved that one of the respondents had asked him to look out for a cow, and that he had a stick with him.

He was going along the Ballymoney Road to Meadow Street, and when he came almost opposite that street a Mrs. Warwick was driving cattle out of her garden at that point.

(1) In the Court of Appeal before Andrews and Best, L.JJ.

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Joseph Hanna, who was in the "middle" or "centre" of the road helped to turn or "kop" the cattle.

At this moment a boy named Patton was riding his bicycle down the Ballymoney Road on his proper side, in the opposite direction to that in which Joseph Hanna had been proceeding.

Joseph Hanna "seemed to turn on to footpath" and the cyclist then struck him. He was then three or four feet off footpath. It was agreed that by the words "turn on to footpath" the witness meant "turn towards footpath."

Mrs. Warwick said that she saw Joseph Hanna crossing over to Meadow Street; that he was "in "centre"; that she saw him "kop" the cows with the stick he had; that he was facing partly her house when the cyclist was coming down and hit him; and that he was then two feet off the footpath.

Upon the evidence the County Court Judge arrived at the conclusion that "as the place and position on "the road of the deceased at moment of the accident, "and which were determining circumstances of the "accident, were occasioned by and resulted from his "attempt to 'kop' the cattle (that is prevent them "going in direction not desired), an activity not "within the scope of his duties," he could not distinguish the case from the case of *Reed v. Great Western Railway Company* (1), and he dismissed the application.

The applicants appealed to the Court of Appeal.

Black, K.C., and *McSparran* for the appellants:—

We submit that the County Court Judge has not addressed his mind to the real question to be decided.

The risk incurred by the deceased was *primâ facie* a risk arising out of the employment.

We rely on the words used by Lord Finlay in his speech in the House of Lords in *Dennis v. A. J. White and Company* (2). In one passage in his speech he said, "if a servant in the course of his master's business "has to pass along the public street, whether it be on

(1) [1909] A.C. 31. (2) [1917] A.C. 479, 482, 488.

" foot or on a bicycle, or on an omnibus or car, and he " sustains an accident by reason of the risks incidental " to the streets, the accident arises out of as well as " in the course of his employment."

We also rely on *Arkell v. Gudgeon* (1), where a woman was employed by the respondent to look after his dental surgery. Part of her duties consisted in going errands. She was sent on an errand, and while returning she slipped on some greasy substance on the pavement and falling broke her wrist.

It was held, applying *Dennis v. White* (2), that the accident arose out of and in the course of the employment.

So far as a workman in the course of his employment has to pass along the public road, he is entitled to be compensated. In *Reed v. Great Western Railway Company* (3), the workman was away from anything that he had to do for his employers. In the present case the workman was crossing the street while acting in the sphere of his employment. As Lord Macnaghten said in his speech in the House of Lords in *Reed v. Great Western Railway Company* (3), " at the time " when the accident happened the man was about his " own business, not about the business of his em- " ployers." That is the distinction between that case and the present.

In the present case, the workman had actually proceeded on his way when the accident happened. If the accident had happened while the workman was " kopping " the cattle we would contend that the applicants were still entitled to compensation. During all the time, while he was on the road, he was on his way to carry out what he was employed to do.

In *McLauchlan v. Anderson* (4), the workman while sitting on a wagon which was being hauled by a traction engine dropped his pipe and in attempting to get down to recover it lost his balance and fell in front of the wheels of the wagon which went over his left leg, fatally injuring him. It was held that the accident arose out of and in the course of the employment.

(1) 10 B.W.C.C. 660.
(2) [1917] A.C. 479.
(3) [1909] A.C. 31, 34.
(4) 4 B.W.C.C. 376.

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We submit that the law is correctly stated by Lord Loreburn in his speech in *Moore v. Manchester Liners, Limited* (1), when he said, " I think an accident befalls " a man ' in the course of ' his employment if it occurs " while he is doing what a man so employed may " reasonably do within a time during which he is " employed, and at a place where he may reasonably " be during that time to do that thing." That statement of the law is quoted with approval by the Lord President in *McLauchlan v. Anderson* (2).

Corbett v. Lancashire and Yorkshire Railway Company (3) greatly resembles the present case. In that case it was held that a boy did not leave the sphere of his employment by stopping to speak to somebody for the purpose of asking the time.

In that case Swinfen Eady, M.R., said, " the mere " fact of his asking the other boy the time is not such " a departure from the sphere of his employment as " to show that he was doing an act for himself and " not for his employers and was running a risk or " hazard that was not part of his employment."

Reed v. Great Western Railway Company (4) should be construed reasonably.

We also rely on *Bratton v. Jonas & Colver, Ltd.* (5), and on *Pepper v. Payer* (6). In the latter case Pickford, L.J., said in his judgment, " It seems to me that this " was not more than a case of doing something within " the scope of his employment in an imprudent " manner." We suggest that there is nothing more in the present case than crossing the road in an imprudent manner.

In *Edwards v. Ocean Coal Co., Ltd.* (7), Warrington, L.J., said in his judgment, " It seems to me that when " a man in the course of a journey makes some im- " prudent step or makes some imprudent motion, the " journey being the employment upon which he is " engaged, he is then performing that duty if at all in a " negligent way. I mean, the worst that can be said

(1) [1910] A.C. 498, 500.
(2) 4 B.W.C.C. 376, 378.
(3) 11 B.W.C.C. 293.
(4) [1909] A.C. 31.
(5) 13 B.W.C.C. 305.
(6) 7 B.W.C.C. 616.
(7) 17 B.W.C.C. 7, 15.

" about it is that he is doing that duty in a negligent " way, not that he is doing something which is outside " his duty altogether, and that, I think is the proper " conclusion at which to arrive in this case." Here, Warrington, L.J., is dealing with the precise point at issue in the present case.

In the present case it appears clear on the evidence and findings that this accident happened not when the deceased was " kopping " the cattle but when " kopping " the cattle was a thing of the past, and he had resumed his employment and was crossing the street.

A man crossing the road negligently does not take himself outside the protection of the Workmen's Compensation Acts. Even if the accident happened during the operation of " kopping " the cattle, the County Court Judge would have to have addressed his mind to the question whether the deceased was doing something negligently in the course of his employment, or was doing something outside the scope of his employment.

If the decision in *Reed v. Great Western Railway Company* (1) is the basis of the County Court Judge's judgment, we would submit that he has misdirected himself in law. *Corbett v. Lancashire and Yorkshire Railway Company* (2) interprets *Reed v. Great Western Railway* (1).

Clarke v. Southern Railway Co. (3) is quite different from the present case. In Clarke's case (3) the workman was entirely outside the area of employment when the accident happened.

If doing this act had taken the deceased outside the area of his employment he had resumed his employment.

[They also referred to *Taylor v. Lock* (4), *Plumb v. Cobden Flour Mills Company, Ltd.* (5), and *Barnes v. Nunnery Colliery Co., Ltd.* (6).

(1) [1909] A.C. 31.
(2) 11 B.W.C.C. 293.
(3) 7 B.W.C.C. 309.
(4) 20 B.W.C.C. 55.
(5) [1914] A.C. 62.
(6) 5 B.W.C.C. 195.

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Murphy, K.C., and *Fox* for the respondents :—

We rely on the words used by Bankes, L.J., in *Guest v. Gaston & Co.* (1), (where a workman authorised to go by tramway from one warehouse to another in the course of his employment, attempted to mount a tramcar in motion), where he said, "It seems to me, "therefore, that in all cases like the present the first "question to decide is whether or not the act which "caused the injury did or did not come within the "scope of the employment."

We rely on the words used by Lord Sumner in his speech in the House of Lords in *Lancashire and Yorkshire Railway v. Highley* (2), where he said, "was it "part of the injured person's employment to hazard, "to suffer, or to do that which caused his injury? "If yea, the accident arose out of his employment. "If nay, it did not, because what was not part of the "employment to hazard, to suffer, or to do, cannot "well be the cause of an accident arising out of the "employment."

We rely on *Espie v. British Basket Co., Ltd.* (3), where a boy, while employed as an assistant attendant at a circular saw, went into the sawpit to recover a can belonging to another employee, and while doing so was injured by the saw. In the ordinary performance of his duties he was not required to enter the sawpit. It was held that the accident did not arise out of and in the course of the employment. In *Espie v. British Basket Co., Ltd.* (3), *McLauchlan v. Anderson* (4) was referred to and distinguished. The Scotch Courts were not prepared to extend the decision in *McLauchlan v. Anderson* (4). The decision in *Taylor v. Lock* (5) is in favour of the respondents' contention.

"Kopping" the cattle was outside the scope of the deceased's employment. We rely on *Brattan v. Jonas & Colver, Ltd.* (6).

These cases necessarily turn on a question of degree, that is a question of fact, and if there was evidence to

(1) [1927] 1 K.B. 1.
(2) [1917] A.C. 352, 372.
(3) 13 B.W.C.C. 492.
(4) 4 B.W.C.C. 376.
(5) 23 B.W.C.C. 55.
(6) 13 B.W.C.C. 305.

support the County Court Judge's finding, that finding should not be upset. We submit that it is a fair reading of the County Court Judge's finding that at the time of the accident, Hanna was engaged in " kopping " the cattle. If that is so, there is no case for the applicant. The accident did not happen in the course of his employment. A workman cannot so extend the liability of his employer by interfering in the affairs of others. The test is, the risk run. Did he incur a risk unconnected with his employment ? There was no causal connection between this man's employment and the accident which befell him.

We submit that it cannot be fairly said that in the present case the accident took place owing to some risk incident to the service.

We rely on *St. Helen's Colliery Co. v. Hewitson* (1). In that case Lord Atkinson suggested a test, " namely, " that a workman is acting in the course of his employ- " ment when he is engaged ' in doing something he " ' was employed to do.' Or what is, in other and I " think better words, in effect the same thing— " namely, when he is doing something in discharge of a " duty to his employer, directly or indirectly, imposed " upon him by his contract of service."

In *Todd v. MacCallum* (2), Andrews, L.J., stated in his judgment that " an accident arises out of a man's " employment when it has resulted from some risk " incident to the duties of his service—a risk to which, " it is reasonable to say, he would not have been " exposed but for such service. The words imply " causality. On the other hand, an accident only " arises in the course of a man's employment if it " occurs while the workman is doing something which " he is employed to do."

It cannot be fairly said that in the present case the accident took place owing to some risk incident to the service. There are risks attached to the " kopping " of cattle which have nothing to do with the delivery of milk.

We submit that the County Court Judge directed his attention to the proper question.

(1) [1924] A.C. 59. (2) [1932] N.I. 130, 141.

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If there is room for a reasonable difference of opinion the County Court Judge's finding should not be disturbed. The action of "kopping" the cattle is different in kind from the delivery of milk.

In *Plumb v. Cobden Flour Mills Company, Limited* (1), Lord Dunedin in his speech in the House of Lords using his own words in the case of *Kerr v. William Baird & Co.* (2), said, "an accident does not arise "'out of the employment' if, at the time the workman "is arrogating to himself duties which he was neither "engaged nor entitled to perform."

McLauchlan v. Anderson (3), *Bratton v. Jonas & Colver, Ltd.* (4), and *Pepper v. Sayer* (5), were all decided on the principle that what the workman did was reasonably incident to the employment.

We rely on *Jones v. Tarr* (6). In that case it was held that in an emergency, even where a question of saving life was involved the workman was not entitled to recover.

We submit that there is a finding of fact against the contention urged on behalf of the applicant that there was no evidence to show that at the time of the accident the deceased was actually "kopping" cattle. This finding is supported by evidence. We rely on Mrs. Warwick's evidence. Having regard to the fact that the deceased's course over to Meadow Street would be in a certain direction the County Court Judge was entitled to find that at the time of the accident he was "kopping" the cattle. He had not disengaged himself from that activity, which was not within the scope of his duties. We rely on *Sparey v. Bath Rural District Council* (7).

The onus is on the applicants to prove that this is an accident arising out of and in the course of the employment and they have failed in their proof.

[They also referred to *Edwards v. Ocean Coal Co., Ltd.* (8), *Barnes v. Nunnery Colliery Co., Ltd.* (9), *Dennis v.*

(1) [1914] A.C. 62, 68.
(2) [1911] S.C. 701.
(3) 4 B.W.C.C. 376.
(4) 13 B.W.C.C. 305.
(5) 7 B.W.C.C. 616.
(6) 18 B.W.C.C. 386.
(7) 23 B.W.C.C. 263; 24 B.W.C.C. 414.
(8) 17 B.W.C.C. 7.
(9) [1912] A.C. 44.

A. J. White & Co. (1), *Race v. H. M. Postmaster-General* (2), *Gilbert v. Coles* (3).

Black, K.C., in reply :—

The deceased was employed to deliver milk and that is what he was doing at the time of the accident. The "kopping" of cattle was done in the centre of the road. The accident is placed by all the witnesses as having taken place close to the footpath on the Meadow Street side. If the County Court Judge had found that the deceased was "kopping" the cattle when struck, that would have been in the teeth of the evidence. If the deceased had temporarily suspended the employment while he pursued "some excursus "of his own," to use Lord Sumner's words in *Lancashire and Yorkshire Railway v. Highley* (4), it is clear on the evidence that he had returned to his employment before the accident happened.

McLauchlan v. Anderson (5) is in the applicant's favour. We rely strongly on *Corbett v. Lancashire and Yorkshire Railway Co.* (6). Even if the accident occurred while the deceased was "kopping" the cattle, the County Court Judge could not have held that he had gone outside the scope of his employment.

ANDREWS, L.J.

Jan, 18,

ANDREWS, L.J. : Joseph Hanna, whose death is the subject of this claim under the Workmen's Compensation Acts, had been for twenty-eight years in the service of The Adair Arms Hotel, Ballymena, of which the respondents are the proprietors. He was general yardman, and had the care of two or three cows. His duties included the milking of these cows, and the carrying of milk to the respondents' customers—some seven or eight in number.

On 19th November, 1932, he left the Adair Arms with a can of milk to be delivered to one of the customers called Adams. It was proved by the deceased's son, and not contradicted, that one of the

(1) [1917] A.C. 479.
(2) 25 B.W.C.C. 24.
(3) 24 B.W.C.C. 481.
(4) [1917] A.C. 352, 372.
(5) 4 B.W.C.C. 376.
(6) 11 B.W.C.C. 293.

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respondents told him that she had asked the deceased to look out for a cow, and that he had a stick with him. Deceased, who was going to Meadow Street, proceeded along the Ballymoney Road, apparently on the left side of the road, until he came opposite or almost opposite to Meadow Street. At this point a Mrs. Warwick was engaged in driving cattle out of her garden which adjoined the Ballymoney Road immediately opposite to Meadow Street. There was evidence, which the learned County Court Judge was entitled to accept, and apparently did accept, that when the deceased was in the "middle" or "centre" of the road he helped to turn or "kop" the cattle. At this moment a boy named Patton was riding his bicycle down the Ballymoney Road on his proper side, in the opposite direction to that in which the deceased had been proceeding. James Leetch, who was called as a witness for the respondents, said that "deceased "seemed to turn on to the footpath and the cyclist "then struck him' He was then three or four feet off "footpath." Counsel agree that by the words "turn "on to footpath" the witness meant "turn towards "footpath." Mrs. Warwick, who was also a witness for the respondents, said that she saw the deceased crossing over to Meadow Street; that he was "in "centre"; that she saw him "kop" the cows with the stick he had; that he was facing partly her house when the cyclist was coming down and hit him; and that he was then two feet off the footpath.

William Reynolds, a witness for the applicants, marked on a map, at the learned Judge's request, the place where the deceased was when he was struck. This point substantially agrees with the place referred to by the other witnesses—within three or four feet of the footpath on the Meadow Street corner, and is appreciably past the centre or middle of the road, which at this point is about twenty-nine feet in width.

Upon this evidence the learned Judge arrived at the conclusion that "as the place and position on the road "of the deceased at moment of the accident, and which "were determining circumstances of the accident, were "occasioned by and resulted from his attempt to

" 'kop' the cattle (that is prevent them going in " direction not desired), an activity not within the " scope of his duties, I could not distinguish the case " from the case of *Reed v. Great Western Railway Co.* (1), " and dismissed the application."

In so far as this is a finding of fact, it left some room for doubt, as was apparent from the arguments of counsel, as to whether in the opinion of the learned Judge the deceased was actually engaged in the operation of " kopping " the cattle at the moment of the accident. Accordingly, we felt it our duty to communicate with the Judge since the hearing, requesting him to say whether he arrived at any and, if so, what specific finding of fact in reference to the following question :—

At the precise moment when the accident happened :

(*a*) Was the deceased still engaged in the operation of " kopping " the cattle ? or

(*b*) Had he completed that operation and resumed his journey across the street ?

To this question we received the following reply :— " I failed to note the movements of the cattle save so " far as relevant to the movements of the deceased ; " but from the evidence recorded in my note I thought " it appeared that immediately before the fatal " accident deceased had ceased his efforts in ' kopping ' " the cattle, and that, from the position he then " occupied on the roadway, he was, at the time of the " accident, turning, or had just before the accident, " turned in the direction of the footpath with the " intention of mounting it."

In my opinion this answer to our question removes any doubt upon the finding of fact ; and the view of the County Court Judge that immediately before the fatal accident deceased had ceased his efforts in " kopping " the cattle is not only supported by evidence, but is the finding at which I would have myself arrived upon the evidence. It only remains to be considered whether on this finding the learned Judge is right in saying that the present case is indistinguishable from *Reed v. Great Western Railway Co.* (1). In my opinion he is not.

(1) [1909] A.C. 31.

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It is settled beyond all question that a workman cannot increase his employer's responsibility by doing something which is not reasonably required or necessary for the due and proper performance of his duties. This is the principle on which *Reed v. Great Western Railway Co.* (1) was decided. An engine driver in charge of his engine left it, and for his own private purpose of getting a book from a friend, crossed a siding. Whilst he was returning to his engine he was knocked down and killed by a wagon which was being shunted. The County Court Judge held that the slight deviation which the man had made did not render the accident one that did not arise out of and in the course of his employment, and he, accordingly, made an award in favour of his widow and child. The Court of Appeal set aside this award, and their decision was affirmed by the House of Lords. It is not unimportant to note that the argument of Mr. Lush, K.C., which apparently prevailed with the Court, was that "the test is whether the man was engaged in his work "or following his own purposes." Whilst affirming the well-settled principle that "labour is often inter-"mittent," Lord Loreburn, L.C., said that the deceased was "where he was not entitled to be, and was not "working but pleasing himself . . . It (the accident) "took place while for the moment he quitted his "employment." To the same effect is the speech of Lord Macnaghten :—"At the time when the accident "happened the man was about his own business, not "about the business of his employers. For the "moment he had put himself outside the area of "protection which the Legislature has carefully marked "out."

These judgments make it, in my opinion, abundantly clear that what the Court must look to see is whether *at the moment* when the accident happened the workman was doing his own business or that of his employers. The House of Lords took, if I may respectfully say so, the natural view that the man who had left his employment for his own private purposes had not resumed it at the moment of the accident, for he would never

(1) [1909] A.C. 31.

have been at this danger-point at all if he had not left his work; and, though the deviation was admittedly slight, he had not in fact returned to a point where his duties could be resumed.

In the present case the facts upon this important issue are essentially different. Whilst proceeding up the Ballymoney Road on his left hand side, and in crossing the road to Meadow Street, he was following a perfectly proper route. There is not a particle of evidence to show that the operation of "kopping" the cattle involved his deviation from his proper path by a single yard. Even if, however, it be assumed that there was any slight deviation, or that by the mere act of "kopping" he had momentarily ceased to be engaged upon his employers' business, in either event the effect of the evidence, as I have pointed out, and as the learned Judge has found, is that the "kopping" was over, and that he had returned to his employers' duties at the moment of the accident.

With every respect for the opinion of the learned County Court Judge, I am of opinion that he misdirected himself when he considered, as appears in his original report, that the applicants were debarred from recovery merely because the deceased's place and position on the road at the moment of the accident were occasioned by and resulted from his attempt to "kop" the cattle. The same might have been said if the "kopping" of the cattle had taken place 200 yards away; yet, if he had subsequently walked that distance for the purpose of delivering the milk, it could not for a moment be contended that the accident did not arise out of and in the course of his employment. The short distance that the deceased had proceeded after resuming his journey cannot affect the principle on which all such cases must be decided:—In whose employment was the workman, that is, whose work was he doing at the *punctum temporis* when the accident occurred?

We were referred by counsel to a line of authority which, it was submitted, would support the view that, even if the deceased was engaged in the "kopping" of the cattle at the moment of the accident, his action

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should be regarded as performed within the sphere of his employment. Such cases are illustrated by *McLauchlan v. Anderson* (1), and may be contrasted with another line of cases such as *Taylor v. Lock* (2), in which the workman failed because at the time of the accident he was doing something which was not incidental—*i.e.*, reasonably incidental—to his ordinary work. The finding of the learned Judge in his supplemental report renders it wholly unnecessary for me to consider these cases further, and I, accordingly, refrain from doing so.

The case must be remitted to the County Court Judge (with a declaration as to the respondents' liability) to assess the compensation to which the applicants are entitled. The applicants must have their costs of the proceedings including this appeal.

BEST, L.J.

BEST, L.J.: In this case the applicants appeal from an order dated the 13th day of May, 1933, of the learned Acting County Court Judge of the County of Antrim, whereby he dismissed the claim of the applicants for compensation from the respondents in respect of the death of Joseph Hanna who was in the employment of the respondents, and who died as the result of an accident which befell him on the 19th day of November, 1932.

Jane Hanna was said to be totally, and James Hanna, partially, dependent, on the deceased Joseph Hanna.

At the hearing of the request for arbitration, James Hanna gave evidence that his father was general yardman to the respondents, who carry on a hotel business in Ballymena, that he milked cows for the respondents and carried milk to their customers, that on the day of the accident (19th November, 1932) deceased left the respondents' yard about fifteen minutes before the accident happened, that he was then carrying a can of milk for delivery to a customer of the respondents and had a stick in his hand, and that in order to deliver the milk it was necessary and proper for the deceased to get into Meadow Street. From

(1) 4 B.W.C.C. 376. (2) 23 B.W.C.C. 55 and 444.

other evidence given in the case it would appear that the deceased, having come out from his employers' yard, walked along the left side of Ballymoney Road for a certain distance, then proceeded to cross that road towards Meadow Street, and it was while he was in the act of crossing Ballymoney Road and before he could or did reach the mouth of Meadow Street, that he was knocked down by a push bicycle and was killed. William Reynolds gave evidence that he had a partial view of the accident, that a push bike struck Joseph Hanna and he fell and that he (Joseph Hanna) had a milk can in his hand at the time of the accident.

For the respondents, James Leetch stated that he saw the accident, he was coming down Meadow Street to Ballymoney Road and was twenty feet from the corner. He saw cattle in Mrs. Warwick's garden (this garden is on the side of Ballymoney Road which is farthest from the opening into Meadow Street and is just opposite that opening). He further said that Mrs. Warwick was putting out the cattle. He saw Mr. Hanna with can and stick in the middle of the road (Ballymoney Road), he was in the centre of the road and seemed to be helping to turn the cattle. He saw cyclist coming down his proper side. Deceased seemed to turn on to (or towards) footpath and the cyclist then struck him. He was then three or four feet from footpath, and in cross-examination the witness said that deceased had been on his left hand side of road and crossed over when struck. (NOTE: this would be the left side as one comes from the Adair Arms Hotel).

Mrs. Jane Warwick, examined, said: "I live "opposite Meadow Street. Cattle in my garden. "I put them out. Did not know deceased. I saw "Hanna crossing over to Meadow Street. Mr. Hanna "in centre. I saw him "kop" the cows with the stick "he had. Hanna facing partly my house, when "cyclist coming down and hit him. He was then two "feet off the footpath," and, on cross-examination she said she saw milk spilled after the accident.

The County Court Judge reports that on the above evidence he decided that as the place and position on

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the road of the deceased at the moment of the accident, and which were determining circumstances of the accident, were occasioned by and resulted from his attempt to "kop" the cattle (that is prevent them going in direction not desired), an activity not within the scope of his duties, he could not distinguish the case from that of *Reed v. Great Western Railway Co.* (1), and he accordingly dismissed the application.

In the case just cited the facts were that an engine driver in charge of his engine left it and, for a purpose of his own and not in the execution of his duty or in the interest of his employers, crossed a siding. On his returning to his engine he was killed by a wagon which was being shunted. At the time when the accident happened the man was about his own business, viz., that of receiving a book from the fireman of a goods train and not about the business of his employers, and the arbitrator held that such a slight deviation did not render the accident, which occurred when he was returning to his engine, one that did not arise out of and in the course of his employment. This decision was reversed by the Court of Appeal and the reversal was upheld by the House of Lords.

During the argument a difference of opinion arose between counsel as to the true meaning of the finding of fact of the County Court Judge and the doubt affected the members of the Court. It was suggested on the one hand that it meant that the deceased was still engaged in "kopping" the cattle when the fatal blow was struck, and on the other hand that it meant that the operation of "kopping" was ended and that the deceased at the moment of collision with the bicycle had resumed his journey towards the entrance to Meadow Street, and was then engaged in carrying out the work of his employers.

If the former were the true meaning of the finding, I agree with the learned County Court Judge that the case would be practically indistinguishable from *Reed v. Great Western Railway Co.* (1), as in that event the accident would have happened whilst the man was about something that he had temporarily made his

(1) [1909] A.C. 31.

own business, viz., the "kopping" of the cattle, and not about the business of his employers.

Different considerations would, however, apply if the operation of "kopping" were over and the man had resumed his journey for the purpose of crossing the street and completing his employers' work. In that event he would in reality be employed not on his own business but on the business of his employers, and this would be so whether the "kopping" operation was finished only a moment, or five minutes, or any other period of time before the resumption of the man's employment. In any such case the deviation from his work, or the departure from the scope of his employment, had terminated and his proper work had been resumed.

For the purpose of resolving the doubt as to the meaning of the finding, a communication was sent to the learned County Court Judge and he was asked to be good enough to say whether he arrived at any, and if so what, specific finding of fact in reference to the following question:—

At the precise moment when the accident happened:

(*a*) Was the deceased still engaged in the operation of "kopping" the cattle? or

(*b*) Had he completed that operation and resumed his journey across the street?

His reply is to the effect that he failed to note the movements of the cattle save so far as relevant to the movements of the deceased, but from the evidence recorded in his note he thought it appeared that immediately before the fatal accident deceased had ceased his efforts in "kopping" the cattle and that from the position he then occupied on the roadway he was, at the time of the accident, turning or had, just before the accident, turned in the direction of the footpath with the intention of mounting it.

I think the obvious meaning of this explanation, and the proper inference to be drawn from it, is that the "kopping" of the cattle was finished and that the deceased was just taking up again or had actually resumed his employer's work when he was struck by the bicycle.

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This being the state of affairs, I am of opinion that the accident arose out of and in the course of the employment of the deceased in the same way as it would have arisen out of and in the course of his employment if the "kopping" had taken place a considerable distance from the scene of the accident, or at an appreciably earlier time, and that his dependants are, in the circumstances, entitled to compensation for the loss they have sustained.

After the Court had delivered judgment, Murphy, K.C., applied on behalf of the respondents that on the re-hearing the County Court Judge should have the evidence of the material witnesses before him before he came to a conclusion.

The Court held that they could not interfere with the discretion of the County Court Judge, and that the application could not be granted.

Solicitor for the appellants: *William Shaw.*
Solicitor for the respondents: *Albert L. McClelland.*

J. McC.

BEATTIE v. LONDON, MIDLAND AND SCOTTISH RAILWAY CO. (N.C.C.) (1).

C.A. 1934.

Feb. 8, 16, 19. March 29.

Workmen's Compensation—" Partial incapacity . . . results from Injury "—Light work at Wages equal pre-accident—Strike—Applicant participates in Strike—Application for re-instatement—No work available as result of Strike—Right to Compensation—Workmen's Compensation Act (Northern Ireland), 1927 (17 *&* 18 *Geo.* 5, *Ch.* 16), *section* 9 (3).

The applicant was formerly employed by the respondents as a roofer. On 31st December, 1921, he was partially incapacitated by an accident which admittedly arose out of and in the course of his employment. He received compensation until 21st May, 1922, when he was given light work by the respondents. He received the same wage as he had formerly been paid as a roofer. He was still engaged upon this work when on 31st January, 1933, a railway strike began against a reduction in the wages payable to certain classes of workers.

Applicant was not directly affected by the reduction. He gave evidence before the Recorder that during the strike there was no work for him to do ; but he admitted on cross-examination that he had been directed to do other light work. Evidence was given on behalf of the respondents that the applicant had been warned that consequence of the strike would be a curtailment in the staff of the company. After the strike the applicant applied to the company for re-instatement which was refused on the ground that as a result of the strike there was no work available for him. He was still partially incapacitated.

Held, by the Court of Appeal (Andrews and Best, L.JJ.), affirming the Recorder of Belfast :—

(1) That the applicant was not entitled to compensation during the period of his refusal to work, *i.e.*, during the strike and after the strike up to the time of his application for re-instatement.

(2) That he did not finally lose his right to compensation by his refusal to work during the strike.

(3) That the fact that the company could not offer the applicant work was due to the strike was immaterial except in so far as it was evidence of a general failure of the labour market for his type of labour.

APPEAL by the respondents from an award by the Recorder of Belfast sitting as an Arbitrator under the Workmen's Compensation Acts.

(1) In the Court of Appeal before Andrews and Best, L.JJ.

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BEATTIE v. LONDON, MIDLAND AND SCOTTISH RLY. CO. (N.C.C.).

The applicant, William Beattie, was formerly employed by the respondents, the London Midland and Scottish Railway Company (N.C.C.) as a roofer. On 31st December, 1921, he was partially incapacitated as the result of an accident which admittedly arose out of and in the course of his employment. He received compensation up to 21st May, 1922, when he was taken back by the Company and given light work at "tool nipping," which consisted in carrying tools to and from workmen. He received the same wage as he had formerly been paid as a roofer. He was still engaged at this work when, on 30th January, 1933, a railway strike began against a reduction of 10 per cent. in the wages payable to certain classes of workers, provided in an award of the Railway Conciliation Board. The applicant was not directly affected by the award ; but he gave evidence before the Recorder that, as the men on whom he attended were called out, there was no work for him to do and he went out and that his job was still vacant. He admitted on cross-examination that the foreman had told him to oil door-hinges and had handed him circulars from the manager. These circulars warned employees that one consequence of the strike would be a curtailment in the staff and that owing to the dislocation of traffic after a strike men could only be taken back as and when work was available. The applicant got strike pay during the strike and was on picket duty. Evidence was given on behalf of the respondents that as a consequence of the strike it had been found necessary to reduce expenditure and that the Company had to dispense with the services of 208 men, of whom the applicant was one ; that all the companies agreed they would re-engage the men who remained on duty. The Recorder held that the applicant was still incapacitated. That he was not entitled to compensation during the period of his refusal of work, *i.e.*, during the strike and after the strike till he applied for re-instatement. That he did not finally lose his right to compensation by his refusal of work. That on declaring his willingness to work the question was whether work was open to him and if not open then what was his loss of earning

power due to his incapacity. That if the employer could not offer work the fact that their inability was due to strike was not material except to the extent that it was evidence of a general failure of the labour market for his type of labour. The Recorder fixed the loss of earning due to the applicant's incapacity at 18*s.* 0*d.* per week and awarded accordingly, no application having been made to date back compensation.

The respondents appealed to the Court of Appeal.

Murphy, K.C., and *MacDermott* for the appellants :—

On the particular facts of this case once there is a refusal of work there is always a refusal. If suitable work is offered and is refused the liability to pay compensation ceases. *Hamilton v. Shelton Iron, Steel & Coal Co., Ltd.* (1) is clearly distinguishable. In that case there was no refusal ; the party was not a party to the strike and was willing to work. [They also referred to *Bromley v. Staveley Coal & Iron Co., Ltd.* (2) ; *Gaffney v. Chorley Colliery* (3) ; *Bevan v. Nixon's Navigation Co.* (4) ; *McNamara & Co., Ltd. v. Burtt* (5).] None of these cases amounts to a decision upon the facts before your Lordships. The applicant's failure to obtain employment is not due to his injury but his refusal of work during a strike and therefore his loss of earning power is not due to the accident.

The applicant has by his own action deprived the Company of the opportunity of giving him work. The findings of the learned Recorder ruled out of consideration the consequences of the applicant's wrongful act which must have been reasonably in his contemplation.

Campbell, K.C., and *Fox* for the respondent :—

There must be a *locus pœnitentiae* in the case of a refusal of work. Whether the loss of earning capacity subsequent to the strike is due to the injury or to the

(1) 19 B.W.C.C. 475.
(2) 16 B.W.C.C. 77.
(3) 15 B.W.C.C. 158.
(4) [1929] A.C. 44.
(5) 4 B.W.C.C. 151.

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strike is a question of fact upon which there is sufficient evidence to support the finding of the learned Recorder. *Bromley v. Staveley Coal & Iron Co., Ltd.* (1). On the finding of incapacity, when no wages are being earned *primâ facie* the workman is entitled to compensation. *Hamilton v. Shelton Iron, Steel & Coal Co., Ltd.* (2). When once it has been established that there is partial incapacity due to the accident the mere fact that a supervening cause has made work impossible does not affect the right to compensation. *Portland Colliery Co. Ltd.* (3); *McNally v. Furness, Withy & Co.* (4); *Harwood v. Wyken Colliery Co.* (5); *Jensen v. Jones (R.E.), Ltd.* (6). The company must either offer applicant work or shew that there is suitable work available for him. The strike is irrelevant.

[They also referred to *Hill v. Ocean Coal Co., Ltd.* (7); *White v. Harris* (8); *Gaffney v. Chorley Colliery Co., Ltd.* (9); *Ray v. Vickers, Ltd.* (10); and *McDonald v. Outram* (11).]

Murphy, K.C., replied.

Cur. adv. vult.

ANDREWS, L.J.

March 29.

ANDREWS, L.J., delivered the judgment of the Court, which was as follows:—The applicant in this case was formerly a roofer in the employment of the respondents. On 31st December, 1921, he met with an accident which admittedly arose out of and in the course of his employment. His right arm and shoulder were fractured, and the permanent partial incapacity which resulted has rendered it impossible for him since to carry on his former trade. He was paid compensation at the rate of 30*s.* per week until 21st May, 1922, when he was taken back and given light work at "tool-nipping," which consisted in carrying workmen's tools. He received at this work the same wage (47*s.* per week) as he had been formerly

(1) 16 B.W.C.C. 77.
(2) 19 B.W.C.C. 475.
(3) [1923] A.C. 566.
(4) 6 B.W.C.C. 664.
(5) [1913] 2 K.B. 518.
(6) 23 B.W.C.C. 158.
(7) 3 B.W.C.C. 29.
(8) 4 B.W.C.C. 39.
(9) 15 B.W.C.C. 158.
(10) 16 B.W.C.C. 200.
(11) 20 B.W.C.C. 761.

paid as a roofer. He was still engaged upon this work when on 31st January, 1933, the railway strike began. The strike was against a reduction of 10 per cent. in the wages payable to certain classes of workers provided in an award of the Railway Conciliation Board. The applicant was not directly affected by the award ; but he gave evidence before the learned Recorder to the effect that, as the men whom he attended were called out, there was no work for him to do and he went out, and that nobody was in his job yet. On cross-examination he admitted that the foreman had told him to oil the hinges of the doors, and that he handed him circulars from the manager, Major Speir. These circulars warned the men that one of the consequences of the strike would be a curtailment of staff, and that, owing to the dislocation of traffic, men could only be taken back as and when work was available. They concluded by urging the men most strongly to remain at their work, assuring them that all men working would receive adequate protection. The applicant received strike pay and was on picket duty during the strike. On behalf of the Railway Company evidence was given that owing to the strike it had been found necessary to reduce expenditure and that the Company had had to get rid of about 208 men, of whom the applicant was one, for whom work could not in the circumstances be found ; that all the Companies agreed they would re-engage the men who remained on duty ; that if the applicant had remained at work a job would have been found for him in the shop ; but that he was refused work on the twofold ground—that he went out on strike, and that there wasn't work for him.

Upon the whole evidence the following facts are clearly established :—

(1) That the applicant, who was not directly affected by the award, voluntarily went out on strike, though expressly requested not to do so, and though warned as to the possible consequence of losing his job.

(2) That his application for re-instatement after the strike was refused on the ground that it had

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been found necessary to curtail expenses in consequence of the strike; that his job had not been filled; and that, being one of the strikers, no other work was found for him.

(3) That he is still suffering from grave physical incapacity resulting from his accident which necessarily handicaps him severely in endeavouring to obtain work, and, indeed, renders him unsuitable for anything other than light work.

The learned Recorder, holding such partial incapacity established, was of opinion that the applicant was not entitled to compensation during the period of his refusal of work—31st January—4th July—that is, during the period of the strike and subsequently until he applied for reinstatement. He considered, however, that the applicant did not finally lose his right to compensation by his refusal, and that on his declaring his willingness to work the question was whether work was open to him, and, if not open then, what was his loss of earning power due to incapacity. Finally, he held that if employers cannot offer work the fact that their inability is due to a strike is not material except to the extent that it is evidence of a general failure of the labour market for his type of labour. The learned Recorder fixed the loss of earning power due to the applicant's incapacity at 18*s.* per week and awarded accordingly, no application being made to date back the compensation owing, as we are told, to the fact that the applicant had been in receipt of full unemployment benefit.

Counsel for the Railway Company challenged these findings and award on several grounds. They contended that on the facts of this case, and, in particular, as applicant's job, after due warning, was gone, it should be held that once there was a refusal to take work there was always a refusal; that the applicant's failure to get work was due not to his incapacity but to the strike, and that, accordingly, his loss of earning power was not due to the accident. They submitted that the Recorder's findings ruled out of consideration the consequences of the applicant's wrongful act which must have been reasonably in his contemplation,

and that they ignored the reasons why the employers could not offer work; that the ordinary principle underlying the relationship of cause and effect must apply to claims under the Workmen's Compensation Acts; and that the real cause of the applicant's loss of work was not his incapacity due to accident but his wrongful act in going out on strike.

We have carefully examined the relevant provisions of the Workmen's Compensation Act, 1906, upon which this case must be decided and also the authorities bearing upon it. Certain principles appear to us to be clearly established. Thus, it has been frequently pointed out, as, for example, by Lord Dunedin in *Portland Colliery Co., Ltd. v. Murray* (1), that the workman's right of compensation rests not on the Schedule, but on the first section of the Act. It is this section which establishes the right where personal injury is caused by accident arising out of and in the course of the workman's employment. The measure of that compensation is determined by the First Schedule, but that is its sole function. It cannot be resorted to for the purpose of cutting down the right to compensation. Paragraph 1 (*b*) of the Schedule prescribes the maximum liability by way of weekly payment to be made "where total or partial incapacity "for work results from the injury," namely, 50 per cent. of the workman's average weekly earnings. This maximum is, however, subject to reduction in certain events to which we shall refer later.

The Courts have been called upon on innumerable occasions to consider the meaning of the words "where "total or partial incapacity for work results from the "injury." It is now settled that in assessing compensation the only incapacity to be considered is physical incapacity to earn due to the injury. It is something personal to the workman, and does not, for example, include inability to get employment owing to the state of the labour market, *Cardiff Corporation v. Hall* (2), followed by the House of Lords in *Bevan v. Nixon's Navigation Co., Ltd.* (3). Sometimes, how-

(1) [1923] A.C. 566, 575.
(2) [1911] 1 K.B. 1009.
(3) [1929] A.C. 44.

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ever, two causes may operate concurrently, one of which only is incapacity due to the injury. In such event the authorities in our opinion are clear that, although the other supervening cause would be in itself sufficient to account for the inability to earn, the workman is entitled to recover compensation proportionate to the incapacity arising from the injury. *Harwood v. Wyken Colliery Co., Ltd.* (1) (affection of the heart), *Lewis v. Wrexham & Acton Collieries Ltd.* (2) and *Stowell v. Ellerman Lines* (3) (state of health including advanced age) illustrate the application of this principle in cases in which the supervening cause related to the workman's health. *McNally v. Furness Withy & Co.* (4) (workman in prison); *Cargo Fleet Iron Co., Ltd. v. Funck* (5) (workman interned as an alien enemy); and *Jenson v. Jones* (*R.E.*), *Ltd.* (6) (misconduct resulting in dismissal) are illustrations of its application where the supervening cause was something extraneous, something wholly disconnected with the workman's health. The principle underlying such decisions is nowhere more clearly stated than in the judgments of the Court of Appeal in *Harwood v. Wyken Colliery Co., Ltd.* (1). The compensation which the Act gives is not for the injury, but for the consequences of the injury, namely, the incapacity to earn wages, or the disablement due to the injury which results in an inability to earn wages. When the second or supervening cause arises the consequences of the first disability still continue because it resulted in his standing at the date of such supervening cause in such a position that it did him less pecuniary damage than it would otherwise have occasioned. As Buckley, L.J., put it (at p. 168):—"While the "compensation is only for the continuing consequences "of the injury measured by diminished capacity to "earn wages, still a supervening cause leaves the "consequence of that diminished capacity still existent "and only adds a further diminished capacity." Partial incapacity for work still results from the

(1) [1913] 2 K.B. 158.
(2) 9 B.W.C.C. 518.
(3) 16 B.W.C.C. 46.
(4) 6 B.W.C.C. 664.
(5) 9 B.W.C.C. 318.
(6) 23 B.W.C.C. 518.

original injury, and it is not necessary under the Act that it should still result "solely" from the injury. "The period of continuance of the weekly payment is," as expressed by Hamilton, L.J., (at p. 170), "during "'the incapacity,' *i.e.*, the incapacity resulting from "the injury, and no reference is made to the possible "supervention of other causes of incapacity."

We have said that the employer's liability to pay 50 per cent. of the workman's average weekly earnings may in certain events be reduced. Such reduction arises under paragraph 3 of the First Schedule to the Act of 1906 which provides that "in fixing the amount "of the weekly payment regard shall be had to any "payment, allowance or benefit which the workman "may receive from the employer during the period "of his incapacity, and in the case of partial incapacity "the weekly payment shall in no case exceed the "difference between the amount of the average "weekly earnings of the workman before the accident "and the average weekly amount which he is earning "or is able to earn in some suitable employment or "business after the accident . . ." This does not mean that such payments *must* be deducted, but merely that regard must be had to them by the arbitrator; and, as an award under the Act is in the nature of "compensation," the workman must not be put by an award in a better position than that in which he would have been for earning wages if he had not sustained the injury. Accordingly, where, as in the present case, the workman, from the time that he resumed employment after the accident, "earned" wages from his employers which were equal in amount to his pre-accident wages, his right to receive compensation was suspended. Sargant, L.J., put the position clearly in his judgment in *Hamilton v. Shelton Iron, Steel & Coal Co., Ltd.* (1). So long as work is found for the workman either at a wage equal to his previous working capacity or at a less wage, he for the time being either suffers no actual loss or a loss reduced by the wage he actually receives. The loss of earning capacity is either latent or partially latent as the case may be.

(1) 19 B.W.C.C. 475. 500.

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Now in our opinion it is clear that if the workman had lost his work and ceased to earn wages by reason of some action on the part of his employers, his right to payment of compensation would have immediately arisen. This was the effect of the decision of the House of Lords in *MacDonald or Duris v. Wilsons and Clyde Coal Co., Ltd.* (1), where light work provided for the workman by his employers came to an end owing to their cutting down their staff. The liability exists because the incapacity continues if the workman's condition makes his labour unsaleable or saleable only at a less wage. So, also, if an injured workman loses his employment by reason of a lockout. The liability continues in either case until the workman's employment is restored to him, or other suitable employment has been obtained or become obtainable at not less than his pre-accident wage. In neither case—cutting down of staff or lockout—can such supervening cause, for which the workman was in no way responsible, restrict or deprive him of his rights. Lord Hanworth, M.R., in our opinion correctly summed up the effect of such cases in *Hamilton v. Shelton Iron, Steel & Coal Co., Ltd.* (2), when he said:—"Thus in all the cases "where it is found that there was a willingness to "work, but the work had ceased to be available, the "employer's liability was not reduced." Accordingly, as the County Court Judge in that case had held that the applicants had not refused to work, but on the contrary, were willing to do so, whilst the work itself had ceased to be available, the Court of Appeal affirmed the arbitrator's awards.

The question which remains to be determined is the extent, if any, to which the workman is deprived of these rights, if, instead of losing his work by reason of his employer's action, he does so in consequence of his own act in going upon strike, though work was offered to him, and he was warned of what the consequences might be if he joined the strikers.

Lord Hanworth, M.R., considered this question of the willingness or unwillingness of the workman to work during a lockout or strike of vital importance,

(1) [1912] A.C. 513. (2) 19 B.W.C.C. 475, 490.

for a little earlier in the same judgment in *Hamilton v. Shelton Iron, Steel & Coal Co., Ltd.* (1), he says :- "If the workman was a striker and refused work, the "cases in which a refusal dominates the position "would apply ; but if not the right to compensation "remains and the employers have no factor to rely "upon which can afford them relief from payment of "the compensation."

There is no evidence that the workman's action in this case was dictated by his trade union ; but, even if it were so, it would in our opinion be an immaterial circumstance, for the compulsion of the trade union would be treated as an act the responsibility for which must as between the workman and his employers fall upon the workman himself, *Williams v. Oakwood Colliery Co., Ltd.* (2) Warrington, L.J., briefly summed up the position when he said (at p. 159) :— "The real truth is that the man is not incapacitated ; "he is suffering from no partial incapacity at the "present moment, so far as the present evidence is "concerned, or from no partial incapacity resulting "from his injury. The incapacity from which he is "suffering, if at all, is incapacity caused by the action "of the trade union, and the Act of Parliament does "not impose upon the employer a liability to pay "compensation for incapacity arising from the action "of the trade union."

Portland Colliery Co., Ltd. v. Murray (3) is the first of several reported strike cases. At any rate in that case the workman was treated as a striker or as refusing to work during the strike. In consequence of the strike the pits had become flooded and no work in them was possible. The Company had offered to reinstate the respondent in his former light employment as soon as it became available. The Sheriff-Substitute found that the workman's failure to obtain outside employment was due not to his injury but to the state of the labour market, and that as his unemployment was not due to his physical incapacity he was not *in hoc statu* entitled to compensation, but made a prospective

(1) 19 B.W.C.C. 475, 489.
(2) 12 B.W.C.C. 151.
(3) 15 B.W.C.C. 362, [1923] A.C. 566.

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award of compensation as from the date when the workman's job at light work would mature. The House of Lords (affirming the decision of the Second Division) held that the Sheriff Substitute was wrong in refusing compensation to the workman *in hoc statu*. The incapacity caused by the accident was the dominant consideration and prevailed over the supervening cause of incapacity due to the flooding of the pits following the strike.

Gaffney v. Chorley Colliery Co., Ltd. (1) was another case arising out of the miners' strike. The workman voluntarily left his work, and, after the strike was over, applied for reinstatement which the employers were unable to provide owing to the pits being flooded. The Judge found that the applicant was an "odd lot" within the dictum of Moulton, L.J., in *Cardiff Corporation v. Hall* (2), and awarded compensation on the basis of total incapacity. It was held by the Court of Appeal that the applicant was able to do light work and was not an "odd lot," and that the case should go back to the judge to assess compensation on the basis of partial incapacity having regard to the loss of earning power due to the accident and not to the condition of the labour market. We refer to this case especially because of the words of Lord Sterndale, M.R., at p. 163:—"A man who is entitled to compensation does not necessarily become disentitled "because he has left the colliery. He may be entitled "so long as his employers are not in a position to take "him back. Therefore even if he left the employment "of his own wish, that does not necessarily prevent "his being entitled to compensation."

In *Bromley v. Staveley Coal & Iron Co., Ltd.* (3), the workman, who was earning higher wages than before the accident, went out on strike, and afterwards failed to get work. The County Court Judge awarded him compensation for partial incapacity both during the period the strike subsisted and subsequently. It was held by the Court of Appeal that, since no compensation

(1) 15 B.W.C.C. 158.
(2) [1911] 1 K.B. 1009, 1021, 1022.
(3) 16 B.W.C.C. 77.

would have been payable in the absence of the strike, the loss of earning capacity during the strike was not attributable to the injury, and that no compensation was payable for this period. There was work available for him if he had applied for it at a rate which would have disentitled him to compensation, and it would be unjust to the employer that during the time that he might have been earning these wages, and might therefore have disentitled himself to have obtained compensation, the employer should have to pay. On the other hand, the question as to whether the loss of earning capacity subsequent to the strike was due to injury or the disorganised state of the labour market, or partly to both, was a question of fact upon which there was some evidence to support the finding of partial incapacity for this period. As regards this subsequent period the present case is in our opinion really governed by *Portland Colliery Co., Ltd. v. Murray* (1). Warrington, L.J., draws a clear distinction between the period of and the period subsequent to the strike. As the workman was at the outbreak of the strike earning more than his pre-accident wage, and would have so continued to earn had it not been for the strike, it was the strike not the injury which, during the strike, caused the incapacity to earn. After the strike, however, the facts were, in the opinion of the learned Lord Justice, different. It was then open to the arbitrator to say that there was some incapacity to earn owing to the injury, and the Court of Appeal would not interfere with his conclusions as to the pecuniary value of that incapacity.

The same principle is to be found in the Scotch strike case of *McDonald v. Outram & Co., Ltd.* (2), in which Lord Ormidale said:—"I am satisfied that "the fact that the appellant broke the law and his "contract of employment by deserting his service "without notice in no way affects the present question. "While the strike lasted his right to compensation "was suspended, but on its termination his right "revived."

(1) [1923] A.C. 566.
(2) 20 B.W.C.C. 761, 774.

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The distinction so drawn as to the workman's rights in regard to compensation at different periods is an old one. In *Hill v. Ocean Coal Co., Ltd.* (1), which was decided in the year 1909, the workman was debarred from "at once" recovering compensation where he lost his employment by reason of his own misconduct; but, as Cozens Hardy, M.R., said (at p. 31):—"It is "quite another proposition to say that by one act of "misconduct a workman loses for ever his right of "claiming compensation from his employers."

In our opinion the learned Recorder arrived at his decision by applying to the facts of the case well settled principles of the law which were acted upon by various Courts in the cases to which we have referred. We are also of opinion that in so far as his findings are findings of fact they are fully supported by the evidence, and are such as we ourselves would have found. In these circumstances the appeal must be dismissed with costs.

Solicitors for the appellants: *O'Rorke, McDonald & Tweed.*

Solicitor for the respondent: *W. K. Gibson.*

J. R.

(1) 3 B.W.C.C. 29.

REX (PETER MAGEE AND BERNARD MAGEE) v. JUSTICES OF DOWN (1).

K.B.D. 1934.

May 3, 4.

Customs—Harbouring cattle unlawfully imported from Irish Free State—Jurisdiction of Justices—Certiorari—Power of Superior Court to review finding of justices on collateral issue—Customs Consolidation Act, 1876 (39 & 40 *Vict.*, *c.* 36), *sections* 186, 259.

The prosecutors were convicted at the N. Petty Sessions before the Justices of D. for harbouring certain cattle unlawfully imported from the Irish Free State, with intent to defraud. It was admitted that no evidence had been given before the Justices proving that the cattle had been unlawfully imported but reliance was placed by the Justices on the description of the cattle, and the contradictory statements of the prosecutors. On behalf of the prosecutors it was submitted that they were entitled to a direction, as no evidence had been given that the cattle had been imported.

The Justices refused this application and convicted the prosecutors.

The prosecutors obtained a conditional order for the issue of a writ of certiorari to remove into the King's Bench Division for the purpose of being quashed the orders made by the Justices.

Held, by the King's Bench Division (Moore, L.C.J., and Brown, J.), in making the conditional order absolute, that the Justices had no power to make an order convicting the prosecutors of harbouring cattle, unless it was proved that the cattle had been unlawfully imported, and that it was the duty of the Justices before entering on jurisdiction to inquire if the necessary conditions existed to give them that jurisdiction, and their decision and the evidence on which it was based, could be reviewed. They could not by a wrong decision upon a fact collateral to the actual matter which they had to try give themselves jurisdiction which they would not otherwise possess.

Rex (*Greenaway*) *v. Justices of Armagh* ([1924] 2. I.R. 55) followed.

CERTIORARI.

The prosecutors, Peter and Bernard Magee, were convicted at the Newry Petty Sessions of the offence of being knowingly concerned in an attempted evasion of a duty of customs by knowingly harbouring certain cattle imported from the Irish Free State into Northern Ireland, contrary to section 186 of the Customs (Consolidation) Act, 1876.

(1) In the King's Bench Division before Moore, L.C.J., and Brown, J.

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At the hearing before the justices, evidence was given by the police that they had seized four cattle on land belonging to the prosecutors situate in Northern Ireland and also four cattle on land which they described as derelict.

No evidence was given that any of the cattle seized by the police and which were the subject matter of the charge had been imported from the Irish Free State into Northern Ireland, but the justices were satisfied that from the description of the cattle and from the contradictory statements of the prosecutors that a *primâ facie* case had been made out to cast the onus upon the defendants under section 259 of the Customs (Consolidation) Act, 1876.

At the conclusion of the case for the Crown an application was made on behalf of the prosecutors for a direction, on the ground that no evidence had been given that the cattle in question had been imported from the Irish Free State. The justices refused the application for a direction and convicted the prosecutors.

The prosecutors obtained a conditional order for a writ of certiorari to remove into the King's Bench Division for the purpose of being quashed the orders made by the justices on the grounds (*inter alia*) that these orders were made without, and in excess of, jurisdiction and that there was no evidence upon which the justices had jurisdiction to convict the prosecutors of the offence with which they were charged.

Cause having been shown on behalf of the complainant in the summons, the prosecutors applied to make the conditional order absolute notwithstanding cause shown.

E. S. Murphy, K.C., and *W. Johnson* for the prosecutors :—

There was no evidence that the cattle had come from the Irish Free State. The justices acted without jurisdiction.

The Court has ample jurisdiction to examine the evidence when it goes to something collateral to the

actual offence. We rely strongly on *Rex (Greenaway) v. Justices of Armagh* (1). In that case it was held by the Court of Appeal that where the jurisdiction of an inferior Court depends upon a fact collateral to the actual matter which the Court has to try, it cannot by a wrong decision with regard to that fact give itself jurisdiction which it would not otherwise possess. The lower Court must decide as to the collateral fact in the first instance, but the superior Court may upon certiorari inquire into the correctness of that decision.

The Attorney-General (A. B. Babington, K.C.), Begley, K.C., and *J. G. Dougherty*, for the Justices of County Down :—

This application is an example of what cannot be done. The Court will not go into the evidence on certiorari. This is an attempt to re-try the whole case before the present Court.

We rely on *Rex (Martin) v. Mahony* (2). In that case an application had been made to quash a conviction on certiorari on the ground of insufficiency of evidence. It was held by the King's Bench Division in Ireland, that the conviction being regular and following the statutory form could not be quashed on such ground, as the evidence could not be examined. We rely on the passages from the judgment of Lord O'Brien, L.C.J., in *Rex (Martin) v. Mahony* (2), at pages 706, 707, 712 and 713.

The decision in *Rex (Martin) v. Mahony* (2) was after argument before the full Court of King's Bench, consisting of Lord O'Brien, L.C.J.; Palles, C.B., and Gibson, Madden, Boyd, Kenny, Wright and Dodd, JJ. Palles, C.B., was the only judge who dissented. In his judgment Gibson, J., said at page 733 :—"the Court "never went outside the record to ascertain by "affidavits what was the evidence actually given."

We submit that every word of these passages applies to the present case. All the other judgments in *Rex (Martin) v. Mahony* (2), except that of Palles, C.B., were to the same effect.

(1) [1924] 2 I.R. 55. (2) [1910] 2 I.R. 695.

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We submit that on the authority of *Rex* (*Martin*) *v. Mahony* (1), evidence given before the justices is not examinable in this Court on certiorari.

In *Rex* (*Redmond*) *v. Jellett* (2), Molony, C.J., who delivered the judgment of the Court, said :—" It seems " to us that when, as here, the justice is sitting as a " Court of summary jurisdiction, and the accused can " call witnesses and tender evidence as he now can, " and the order of the justice shows on its face the " facts necessary to give jurisdiction to make such " order, *The King* (*Martin*) *v. Mahony* (1) applies, " and the order cannot be quashed on the ground of " the reception of illegal evidence."

In the present case the facts could not be satisfactorily investigated before this Court.

Unless there is something contrary to natural justice the record cannot be examined, and the decision of the justices is final. There was nothing unjust in the proceedings in the present case.

In *Reg. v. Bolton* (3), it was held that when a conviction or order of justices is returned to the Court of Queen's Bench, and the proceedings are regular in form and in practice, and the case one over which the justices had jurisdiction, the Court will not hear affidavits impeaching their decision on the facts, nor, if they return the evidence will it review their judgment thereupon.

This is an application for a writ of certiorari, it can only succeed if error appears upon the face of the order, or if it is shown that the proceedings before the justices were contrary to natural justice.

In *Rex* (*Greenaway*) *v. Justices of Armagh* (4), there was clearly a collateral matter in question, but the matter that is charged in the present case is not collateral. Both smuggling and harbouring are part of the *corpus delicti*.

We submit that if it is to be held that the decision in *Rex* (*Greenaway*) *v. Justices of Armagh* (4), is contrary to that in *Rex* (*Martin*) *v. Mahony* (1), then such decision is a clear exception to the general rule of law.

(1) [1910] 2 I.R. 695.
(2) [1919] 2 I.R. 79, 86.
(3) 1 Q.B. 66.
(4) [1924] 2 I.R. 55.

Here the matter is not collateral, it goes directly to the jurisdiction.

We submit that the conditional order should be discharged and the conviction should stand.

W. Johnson (in reply) :—

We submit that it is quite clear that although *Rex* (*Martin*) *v. Mahony* (1) is good law, it has no application to the present case.

We rely on the passage in the judgment of Moore, L.J., in *Rex* (*Greenaway*) *v. Justices of Armagh* (2), where he says :—" Where the subject matter of the " application is within the jurisdiction of the justices " the Court will not interfere, even if they go wrong " in fact ; but where there is of necessity a preliminary " inquiry—or, as it has been called, ' a collateral " ' inquiry,' on which the justices must find, to give " themselves jurisdiction to deal with the application— " certiorari will undoubtedly lie to review their decision " on such preliminary point."

Where the matter is collateral, and the question of the importation of the cattle from the Irish Free State is certainly collateral, there the King's Bench Division has jurisdiction to review the decision of the justices.

In *Palmer v. Crone* (3), Talbot, J., in his judgment said :—" If justices have before them a matter appar- " ently within their jurisdiction, and then it is alleged " that, because of some fact collateral to the merits " of the case, they have no jurisdiction, although they " must inquire into the truth of the fact alleged to " see whether they are to proceed or not, their decision " upon that question is always open to review by the " High Court, and will be corrected if erroneous by " the appropriate writ ; see *Bunbury v. Fuller* (4), and " *Rex v. Bradford* (5)."

It is quite clear from the decision in *Rex v. Bradford* (5), that this Court has jurisdiction to review the decision of the justices in this collateral matter.

Unless *Rex* (*Greenaway*) *v. Justices of Armagh* (2) was wrongly decided this Court can consider the evidence given before the justices. *Cur. adv. vult.*

(1) [1910] 2 I.R. 695.
(2) [1924] 2 I.R. 55.
(3) [1927] 1 K.B. 804, 809.
(4) (1853) 9 Ex. 111, 140.
(5) [1908] 1 K.B. 365.

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REX (MAGEE) v. DOWN JUSTICES.

SIR WILLIAM MOORE, L.C.J.

May 4.

MOORE, L.C.J., delivered the judgment of the Court as follows :—

This is an important case because, unfortunately, as we all know, there is a great deal of smuggling of cattle into Northern Ireland across the border at the present time, but it is not our province to consider the advisability of amending the law, we can only deal with it as we have it before us. We have considered this matter very carefully and we are both agreed.

The facts are that on the 1st November two brothers, Peter and Bernard Magee, were convicted at the Newry Petty Sessions before the Justices of Down in that they were knowingly harbouring certain cattle imported from the Irish Free State with intent to defraud His Majesty of the duties payable upon them contrary to section 186 of the Customs Consolidation Act, 1876.

As regards that fact, a conditional order was obtained from this Court on the 12th January of this present year and we were told during the argument by counsel that he supported the granting of the motion to make that order absolute on the grounds set out in the conditional order, 1 and 3, viz. :—that the orders were without and in excess of jurisdiction, and that there was no evidence upon which the justices could convict the defendants of the offence with which they were charged.

Generally speaking, I think it is very undesirable that these matters should be brought before us on certiorari. It is very difficult to review cases as to what the truth in law and in fact upon evidence before the magistrates was, and I would, speaking for myself, suggest that the magistrates should in their discretion, as well as members of the Bar, consider the manner in which cases are put forward. Where possible, it would be more in the interests of justice that they should be brought before us on case stated, in which the facts are found and only the question of law remains to be decided on those facts. This Court did decide a very similar case a short time ago when we were relieved of all trouble on that score by the fact that it was brought on a case stated. If it comes before us

on certiorari, we agree with the Attorney General that it is not in our power to examine the facts. Certainly there are some few exceptions to that rule; see judgment of Gibson, J., in *Rex* (*Martin*) *v. Mahoney* (1), where he cites several cases in which on certiorari we may examine evidence on suggestions that the decision is against natural justice, or that acts of some of the justices amount to bias on the part of the Court. Speaking generally, however, these exceptions are few, and, giving judgment in *Rex* (*Martin*) *v. Mahoney* (1) he decides that evidence given before justices at Petty sessions on conviction is not examinable on certiorari, and we quite appreciate and agree with that decision.

Now, in Martin's case (1), the sole offence charged before the Court was a single offence, viz., that the respondent had used certain premises for the purpose of betting, and the only question for trial there was whether or not there was sufficient evidence to justify a conviction. That was the sole issue for the justices, and as I said, a full Court consisting of Lord O'Brien, L.C.J.; Palles, C.B., and Gibson, Madden, Boyd, Kenny, Wright and Dodd, JJ., gave carefully considered judgments saying that the question was outside the jurisdiction of the King's Bench Division to consider, once the justices had acted within their jurisdiction. We entirely approve of that and think it applicable to this case.

As always, we had very considerable assistance from counsel on each side given us. On admission of the Attorney General on behalf of the Crown and submission of Mr. Johnson on behalf of the defendants, the question was a case of alleged unlawful importation from the Free State and one, according to Mr. Johnson only, in which smuggling was a collateral issue or an offence.

In one sense it was a composite offence. There is no such offence as that for merely harbouring cattle. Cattle are not like tobacco or spirits which are always dutiable. Imported or smuggled—I use the word "smuggled" for convenience, though it is scarcely a sufficient term for a judgment of this Court, but it

(1) [1910] 2 I.R. 695.

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serves to make me clearly understood—cattle in Northern Ireland are only dutiable, once it is proved that they have been "smuggled." We so decided in fact in the last case to which I have already referred, but the charge here is only a charge of harbouring cattle, which is not an offence unless they have been smuggled. If the cattle have been smuggled and the defendants have harboured them, there must be proof before the magistrates that the cattle have been imported, and until this is proved the magistrates have no power to convict, for no offence is shown in law. This then is a preliminary issue necessary to be found in the first place before the justices have jurisdiction to try the defendants for the offence.

Such a preliminary issue can always be reviewed on certiorari. This point was considered by us in *Greenaway's case* (1), and I would draw particular attention to the importance of this decision. *Greenaway's case* (1) is a case from the Court of Appeal, which it reached as being purely a civil issue, one of the few of that class to be brought before the Superior Court. It is important as a Court of Appeal decision. The Crown contended that a certain place was an orchard and it was pleaded that, unless it was an orchard, the justices had no jurisdiction to make an order. I am clearly of opinion here that the present case is on all fours with *Greenaway's case* (1). The justices have no power to make an order convicting these people of harbouring cattle unless it is proved that they were smuggled cattle, and this Court has always held, and that right has been confirmed in *Greenaway's case* (1), that justices have a right, before entering on jurisdiction, to enquire if the necessary conditions exist to give them that jurisdiction, and their decision on that can be reviewed as they can not give themselves jurisdiction by a wrong finding thereon.

In *Greenaway's case* (1) the Court of Appeal was asked to consider whether the evidence justified the finding of the justices on the question of fact as to whether the place was an orchard in fact. Mr. Murphy

(1) [1924] 2 I.R. 55.

was in that case and he asked the Court to hold that the place was not an orchard, his argument being that it was not a place for the cultivation of fruit trees. The Attorney General (also in that case) said there was an orchard in existence.

In the present case there is no trouble on the question as to whether the cattle had been smuggled. It is admitted by the Crown that there was no legal evidence put before the Court which would justify the finding that these were smuggled cattle, and therefore, there being no evidence before the Court that the cattle were smuggled, there was no evidence to justify the magistrates in their finding, and there was, therefore, no jurisdiction to convict the defendants of harbouring, as there must be proof that the cattle were smuggled before any offence under that head could be committed.

I again refer to *Greenaway's case* (1). I was one of the judges who heard that appeal, but that does not affect the weight of the Court of Appeal's decision. I stated the facts in *Greenaway's case* (1), and I should like to read one passage, p. 59, also in *Greenaway's case*.

In *Greenaway's case*, page 59, the head note in the case of *R. (de Vesci) v. The Justices of Queen's County* (2), runs thus:—"It is a condition precedent to the "jurisdiction of justices to make an order under "section 162 that the lands are not an orchard, and "their decision that it is not an orchard may be "challenged on certiorari, not merely on the ground "that there was no evidence to support it, but also "with reference to the weight of evidence." This correctly represents the judgments of Lord O'Brien, C.J., and Gibson, J. *Rex v. Bradford* (3) is referred to in the judgment of Gibson, J. A similar case had previously been decided by the Court in *R. (Holmes) v. Justices of King's County* (4), though this case does not appear in the authorised reports. But the *ratio decidendi* is this—that where the subject matter of the application is within the jurisdiction of the justices the Court will not interfere, even if they go wrong in fact;

(1) [1924] 2 I.R. 55.
(2) [1908] 2 I.R. 285.
(3) [1908] 1 K.B. 365.
(4) 4 N.I. J. 22.

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but where there is of necessity a preliminary inquiry—or, as it has been called, a "collateral inquiry" on which the justices must find, to give themselves jurisdiction to deal with the application—certiorari will undoubtedly lie to review their decision on such preliminary point.

Cockburn, C.J., in *Reg. v. Russell* (1), says:—"The "rule on which this Court acts as to summary con- "victions by magistrates is that it looks to see whether "there was foundation for their jurisdiction—that is, "whether they had a right to enter on the inquiry; "once it is found they had, this Court will not take it "on itself to determine whether it would have come "to the same conclusion." Such is clearly a preliminary or collateral matter quite distinct from the main duty of the magistrates.

I thus refer to *R. v. Bradford* (2) because in that case the justices had authorised entry into a park for several purposes. They had no jurisdiction as the lands were not a park. The justices purported to find that they were not a park. The head-note runs as follows:—"Held, 1, that the question whether the "land was a park or not was one preliminary to the "exercise of the jurisdiction given by the statute, "and that the justices could not by wrongly deciding "that the land was not a park give themselves juris- "diction in the matter." This is almost verbatim the judgment of Channel, J., at p. 372. At p. 373 Bray, J., observes:—"Therefore the justices must "first of all inquire whether the place is a park or not. "But that inquiry is not in the course of the exercise "of the jurisdiction, but as a preliminary to it. The "case therefore falls within the rule laid down in "*Bunbury v. Fuller* (3), and the justices' decision upon "the matter is open to review. That being so, I agree "with Channel, J., that upon the evidence we ought "to find that the place was in fact a park." Sutton, J., concurred. The Court allowed certiorari to bring up and quash the licence on the ground that it was a preliminary matter, going to the foundation of juris-

(1) 10 B. & S. 117.
(2) [1908] 1 K.B. 365.
(3) 23 L.J. (Ex.) 29.

diction, into which the Court had power to inquire, and, to prevent injustice to any ordinary subject, would inquire.

Now, my colleague in *Rex* (*Greenaway*) *v. Justices of Armagh* (1) was Andrews, L.J., who took exactly the same view and expressed it exceedingly well. I am quoting Andrews, L.J., as on page 63, where he says :— "Certain legal principles relevant to this issue are, I "think, too well settled to admit of serious contra- "diction. Certiorari will always lie to quash the "proceedings of an inferior Court which has acted "without jurisdiction. Such absence of jurisdiction "may arise by reason of the nature of the subject- "matter depriving the inferior Court of any authority "to enter on the inquiry. Jurisdiction may, in other "words, depend, as in my opinion it does in the "present case, upon the existence of some particular "fact. An erroneous decision of an inferior Court "on such a question of fact can always be reviewed "by the King's Bench Division and by this Court. "Indeed, one of the most important duties of the "King's Bench Division is to control the acts of "subordinate tribunals and to restrict the exercise "of their jurisdiction within authorised legal limits. "In a recent case in this Court, *Crawford v. Tyrone "County Council* (2), in dealing with this branch "of the law, I quoted with approval a passage from "Halsbury, vol. X, pp. 193-4, which appears to "me to be based on sound principle and authority. "If the fact upon which the jurisdiction of an inferior "Court depends be collateral to the actual matter "which that Court has to try, it cannot by a wrong "decision with regard to it give itself jurisdiction "which it would not otherwise possess. The lower "Court must, no doubt, decide as to the collateral "fact in the first instance, but the superior Court may "upon certiorari inquire into the correctness of the "decision, and may quash the proceedings in the "lower Court if such decision is erroneous, or at any "rate if there is no evidence to support it. On the "other hand, if the fact in question be not collateral,

(1) [1924] 2 I.R. 55. (2) Unreported.

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"but a part of the very issue which the lower Court "has to inquire into, certiorari will not be granted, "although the lower Court may have arrived at an "erroneous conclusion with regard to it." Then he quotes from the judgment of Coleridge, J., in *Banbury v. Fuller* (1), and also approves Channel's judgment in *Rex v. Bradford* (2), and he also refers to the other case of *Rex (de Vesci) v. The Justices of Queen's County* (3).

So this is how the law stands, and we hold that it is necessary for the justices in this case to have evidence before them that the cattle had been wrongfully imported. Until this is proved the defendants cannot be guilty of any offence in harbouring the cattle unless it is proved that they have been smuggled. That is our view of the law as accepted and approved by the authorities.

We think the conditional order should be made absolute with costs against the Customs authorities.

Solicitors for the prosecutors: *Fisher & Fisher.*

Solicitors for the Justices of Down: *Martin H. Turnbull & Co.*

J. McC.

(1) 23 L.J. (Ex.) 29, 35.
(2) [1908] 1 K.B. 365, 371.
(3) [1908] 2 I.R. 285.

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(1933. No. 1317.)

April 17, 18.

Promissory Note—Evidence identifying handwriting of subscribing witness—Whether signature of Maker of Note proved by proving handwriting of subscribing witness—Common Law Procedure Amendment Act (Ireland), 1856 (19 & 20 Vict., c. 102) section 29.

The plaintiff, as administrator of J.M. deceased, claimed £84 13*s.* 6*d.* balance alleged to be due by the defendants, P. B. & J. B., to the plaintiff on foot of a promissory note, made by the defendants in favour of J. M., deceased.

The defendant, P. B., entered no appearance and did not defend.

The promissory note bore the signatures of P. B. and J. B., and these signatures were alleged to be the signatures of the defendants. The signatures to the note had been attested.

Evidence was given identifying the handwriting of the subscribing witness.

Evidence was also given of an arrangement as a result of which J. M. refrained from taking legal proceedings against the defendant J. B.

Counsel, on behalf of the defendant, J.B., at the close of the plaintiff's case asked for a direction on the ground that there was no proof of the execution of the note.

The trial judge considered that there was sufficient evidence in the absence of any explanation by the defendant who was in Court. He, accordingly, refused to direct, and gave judgment against the defendant, J. B.

Held, by the Court of Appeal (Andrews and Best, L.JJ.), that the signature of the defendant, J. B., could be properly proved by merely proving the handwriting of the attesting witness, and that the trial judge was right in law in holding that the evidence tendered was sufficient to establish such a *prima facie* case as he was entitled to act upon in the absence of evidence to the contrary.

MOTION TO SET ASIDE JUDGMENT.

The plaintiff claimed £84 13*s.* 6*d.* the balance of money alleged to be due by the defendants, Philip Bryne and James Byrne, to the plaintiff on foot of a joint and several promissory note, dated 21st January, 1918, made by the defendants in favour of

(1) In the Court of Appeal before Andrews and Best, L.JJ.

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James Moss, since deceased, for £60 0*s.* 0*d.* with interest at five per cent. The plaintiff was the administrator of James Moss.

The defendant, Philip Byrne, entered no appearance and did not defend, but no judgment was sought against him. By his defence, the defendant, James Byrne, pleaded that he did not make the note sued on.

The action came before Brown, J., sitting without a jury.

The promissory note bore the signatures of "Philip "Byrne, Ballymoughan," and "James Byrne, "Stracumber," and these signatures were alleged to be the signatures of the defendants, who were brothers residing within about a mile of one another. In the left hand corner of the note opposite to both signatures were the words: "Witness first "truly read. Arthur McSorley, J.P., Castlederg."

The plaintiff, a solicitor, swore that this Arthur McSorley (deceased) was a client of his, and identified McSorley's handwriting. He further gave evidence that James Moss the payee in the note, was a client of his, and that in May, 1928, Moss came into his office with Patrick Moss; that he then wrote to James Byrne and Philip Byrne, and that Patrick brought him a message and he stayed proceedings. Patrick Moss gave evidence that James Byrne called with James Moss a week or so after they had been with the plaintiff, and said: "James, I see you are pushing "for your money." James Moss said he was and Byrne said he couldn't blame him, and added: "There's no one to pay the money but me, for Philip "would pay nothing." James Moss said he must get some money, as he wanted his notes squared up. Byrne said he had no money, but he had a calf at Philip's, and he would give him it.

Byrne said the calf was worth £5, and he would leave £2 to be put on the other note (alleged by the plaintiff to be note of 15th March, 1912, for £40 to which he, James Byrne, was not a party), and he would get it off Philip in some way, and "£3 on his own." As a result of this arrangement James Moss asked Patrick Moss to tell the plaintiff not to process, and

to put £3 on one note and £2 on the other. The calf was then taken from Philip Byrne's to James Moss's byre.

At the close of the plaintiff's case, an application was made on behalf of the defendant, James Byrne, for a direction on the ground that there was no proof of execution of the note ; but the trial judge was of opinion that there was sufficient *primâ facie* evidence, and no explanation having been given by the defendant, who was in Court, he refused to direct, and gave judgment for £87 0*s.* 0*d.* against James Byrne.

The defendant moved for an order that the trial judge misdirected himself in law by holding that the signatures to the promissory note had been proved when there was no evidence or no sufficient evidence adduced at the trial of the action.

E. S. Murphy, K.C., and *Cooke* in support of the motion :—

In *Roscoe's Nisi Prius* (19th edition), p. 331, the law dealing with the subject is stated as follows :— "The making of the note is proved by proving the "handwriting of the defendant ; or, if made by an "agent, by proof of the handwriting and authority "of such agent." We submit that this is a correct statement of the law.

The net question to be decided is, whether the signature of the person who signed the note is evidence of the making of the note ?

In *Nelson v. Whittall* (1), Bayley, J., in his judgment said : "It is laid down in Mr. Phillipp's Treatise on "the Law of Evidence, that proof of the handwriting "of the attesting witness, is in all cases sufficient. "I always felt this difficulty, that that proof alone "does not connect the defendant with the note. If "the attesting witness himself gave evidence he would "prove, not merely that the instrument was executed, "but the identity of the person so executing it ; but "the proof of the handwriting of the attesting witness "establishes merely that some person assuming the

(1) 1 B. & Ald. 19, 21.

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"name which the instrument purports to bear, "executed it; and it does not go to establish the "identity of that person, and in that respect the "proof seems to me defective."

In the present case there was no evidence of the actual making of the note, and the defendant was not obliged to go into the witness box until such evidence was given.

[They also referred to *Whyman v. Garth* (1), *Kay v. Brookman* (2), and to section 29 of the Common Law Procedure Amendment Act (Ireland), 1856.]

McGonigal, K.C. (with him *McSparran*), for the plaintiff:—

We submit that Brown, J.'s, decision was right. There was ample evidence to go to the jury, of a clear admission on the part of the defendant, that he was liable on the note. If the witness happened to be dead or beyond the seas, the execution of the note could be proved by proving the signature of the attesting witness.

A statement of the law on the subject is to be found in *Adam v. Kerr* (3), where it was held that in debt on bond, if one of the attesting witnesses be dead and the other beyond the process of the Court, it is sufficient to prove the handwriting of the witness that is dead. That was a clear decision that it is sufficient to prove the signature of the attesting witness. In Case 1010 Anonymous (4), hands of persons beyond the seas were admitted to be proved. Per Holt, Chief Justice, at Nisi Prius, "In debt upon a bond upon issue of "*non est factum*, if the plaintiff prove the witnesses "dead, beyond sea, or that he has made strict enquiry "after them, and cannot hear of them, he shall be "let in to prove their hands."

We submit that the law is correctly stated in *Roscoe's Nisi Prius* (19th edition), page 121, where it is stated: "Some evidence of the identity of the party to "the instrument must be given, though very slight "evidence will be sufficient."

(1) 8 Ex. 803.
(2) 3 Car. & P. 555.
(3) 1 Bos. v. Pul. 362.
(4) 12 Mod. 607.

Similarity of the name is sufficient to change the onus and put the defendant on proof.

In *Sewell v. Evans* (1), it was decided that to prove the execution by defendant of an instrument on which he is sued, if it be shown that such instrument is executed by a person bearing defendant's name, it is not necessary to give evidence strictly identifying the person whose signature is proved with the party on whom the process has been served, unless facts appear which raise a doubt of the identity.

In *Roden v. Ryde* (2), Lord Denman, C.J., said in his judgment "in cases where no particular circum-"stance tends to raise a question as to the party "being the same, even an identity of name is some-"thing from which an inference may be drawn."

In *Taylor on Evidence*, vol. 2, page 1238, par. 1860, the law is stated in very similar terms : "It is, however, "now well established that in ordinary cases, where no "particular circumstance tends to raise a question "as to the party being the same, mere identity of "name is something from which an inference of identity "may be drawn."

In *Hamber v. Roberts* (3), it was held that it is not necessary to prove strictly the identity of the defendant with a person of the same name, concerning whom a witness gives evidence. The similarity of the names is sufficient to put the defendant to the proof that he is not the person spoken of.

In the present case, the execution of the note has been proved by proving the attesting witness's signature and his identity by the similarity of the names.

In *Page v. Mann* (4), it was held that proof of the hand-writing of the subscribing witness to an instrument is sufficient, he being dead, without any further proof of the identity of the parties, except the identity of name and description.

We submit that the plaintiff was quite entitled to prove the execution of the promissory note in the way in which he did.

(1) 4 Q.B. 626.
(2) 4 Q.B. 626, 633.
(3) 18 L.J. (Common Law) 250.
(4) M. & M. 79.

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[They also referred to section 29 of The Common Law Procedure Amendment Act (Ireland), 1856, and to *Whitelocke v. Musgrave* (1)].

Cooke (in reply):—

Proof of the signature of the attesting witness is no proof of the execution of the document. The weight is on the signature of the party who executes the document and not on the signature of the attesting witness.

Section 29 of the Common Law Procedure Amendment Act (Ireland), 1856, entirely altered the situation as it existed.

In *Sewell v. Evans* (2), and *Roden v. Ryde* (3), the facts were entirely different from those existing in the present case.

In order to prove the document, the best evidence should have been called.

Cur. adv. vult.

ANDREWS, L.J.

April 18

ANDREWS, L.J., delivered the judgment of the Court as follows:—

In this case the plaintiff claims £84 13*s.* 6*d.*, being the balance of the money alleged to be due by the defendants to the plaintiff on foot of a joint and several promissory note, dated 21st January, 1918, made by the defendants in favour of one James Moss, now deceased, for £60 with interest at five per cent. The plaintiff is the administrator of the said James Moss. The defendant Philip Byrne, entered no appearance and has not defended, but no judgment has been sought against him. Of the three pleas contained in the defence of the defendant, James Byrne, the only one now material is that he did not make the note sued on.

The trial took place before Brown, J. without a jury on 15th February last. The promissory note bore the signatures of "Philip Byrne, Ballymoughan," and "James Byrne, Stracumber," and these signatures

(1) 1 C. & M. 511.
(2) 4 Q.B. 626.
(3) 4 Q.B. 630.

were alleged to be the signatures of the defendants, who are brothers residing within about a mile of one another. In the left hand corner of the note opposite to both signatures are the words:—"Witness first "truly read. Arthur McSorley, J.P., Castlederg." The plaintiff, who is a solicitor, swore that this Arthur McSorley (now deceased) was a client of his, that he was quite familiar with his handwriting, and that he had no doubt that the signature on the note was his. He further gave evidence that James Moss, the payee in the note, was a client of his, and that in May, 1928, he came into his office with Patrick Moss; that he wrote to James Byrne and Philip Byrne, and that later Patrick came with a message and he stayed proceedings. Patrick Moss gave evidence that he lived with James Moss for two years; that James Byrne called with James Moss in May (i.e., May, 1928), a week or so after they had been with the plaintiff. Byrne said: "James, I see you are pushing for your "money." James Moss said he was. Byrne said he couldn't blame him, and added:—"There's no one "to pay the money but me, for Philip would pay "nothing." James Moss said he must get some money, as he wanted his notes squared up. Byrne said he had no money, but he had a calf at Philip's, and he would give it. Byrne said the calf was worth £5, and he would leave £2 to be put on the other note (alleged by the plaintiff to be a note of 15th March, 1912, for £40, to which he, James Byrne, was not a party) and he would get it off Philip in some way, and "£3 on his own." As a result of this arrangement James Moss asked Patrick Moss to tell the plaintiff not to process, and to put £3 on one note and £2 on the other. Further evidence was given of the obtaining of the calf at Philip Byrne's, and of the taking it to James Moss's byre.

At the close of the plaintiff's case Mr. Murphy, on behalf of the defendant, James Byrne, asked for a direction on the ground that there was no proof of the execution of the note; but the learned judge was of opinion that there was sufficient evidence in the absence of any explanation by the defendant (who

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was in Court) to go "to the jury," and he refused to direct. Mr. Murphy relied upon his application for a direction, and the judge, accordingly, gave judgment for £87 against James Byrne.

The sole question which we have to determine is whether the learned judge was right in law in holding as he did. Was there sufficient evidence that the defendant, James Byrne, signed the note?

In the first place, from the position of the words: "Witness first truly read," followed by the signature of "Arthur McSorley," the judge was fully justified in inferring that McSorley witnessed the signatures of both Philip and James Byrne. It was, in our opinion, both a natural and proper inference. In these circumstances, was the signature of James Byrne properly proved by merely proving the handwriting of the witness McSorley? This is a question of law upon which we entertain no doubt.

The handwriting or signature of unattested documents must from the necessity of the case be proved in some such way as by calling the writer, or some person who has knowledge of the writing, or by comparison with genuine documents. When, on the other hand, a document is required by law to be attested, it must, subject to certain exceptions, none of which applies to the present case, be proved by calling the attesting witnesses if available and capable of being called. The reason for this is not that proof of the attesting witness is the best evidence, but that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution. Phipson on Evidence, 6th edit. 519. Prior to the Common Law Procedure Act, 1854, in England, and the corresponding Act of 1856 in Ireland, this rule applied strictly not merely to documents required by law to be attested, but to all attested documents even though the attestation was unnecessary. When, however, the witness was incapable of being called, as, for example, when he was dead, or absent in a foreign country, or insane, the necessity for his production was waived, and the due execution of the document could be proved by the secondary evidence of the

witness's handwriting, or, if this was not obtainable, by presumption or other available evidence. Proof of the subscribing witness's handwriting was treated as evidence of the execution of the instrument by the party therein named whose signature the instrument purported to bear; and for the purpose of proving that the instrument was executed by the party so named it was not necessary to prove the handwriting of the party. (See Russell on Crimes, 8th edit. 1987).

In this state of the law, it is clear that when, as formerly, bills of exchange and promissory notes required attestation, the execution of the document by the party whose signature it purported to bear was properly proved by the production of the attesting witness if available, and, if not so available, then by proof of his handwriting. This also was the law which applied after attestation became unnecessary and before the Common Law Procedure Act, 1856, if in fact such bill of exchange or promissory note was attested. How then was the law altered by that Act? Section 29 provides that: "It shall not be necessary "to prove by the attesting witness any instrument "to the validity of which attestation is not requisite; "and such instrument may be proved by admission "or otherwise as if there had been no attesting witness "thereto." Now in our opinion it is clear from the use of the words "*It shall not be necessary* to prove" and "such instrument *may* be proved" that the section is purely an enabling one, which was passed to facilitate proof and to relax the rigour of the common law rule in cases in which attestation is not necessary to the validity of the document by permitting such proof to be effected by admission or otherwise as if there had been no attesting witness. An enabling section of this character was not intended to have, and in our opinion, it had not the effect of rendering the existing methods of proof no longer permissible; and we, accordingly, hold that it was competent for the plaintiff to prove the signature of the defendant, James Byrne, by proof of the handwriting of the attesting witness, McSorley (now deceased) just as it would have been competent to have proved it by the production of McSorley if he had been alive.

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We desire to add that in cases of proof of this character the better opinion appears to us to be that it is necessary to give some *primâ facie* evidence establishing the identity of the person whose name it bears with the defendant, or otherwise to connect the defendant with the note. This may be done in many different ways, as, for example, by showing that he was present when the note was prepared *Nelson v. Whithall* (1), or that he has spoken of the contents of the document, *Doe v. Paul* (2), or by proof of similarity of name and address and occupation, or even, if the name be uncommon, by proof of name alone, *Hamber v. Roberts* (3). Should the name be common, its similarity to that of the defendant will not suffice, *Jones v. Jones* (4), and *Whitelocke v. Musgrave* (5), where the party sought to be fixed with liability was a marksman. In our opinion such evidence of identity of the defendant, James Byrne, with the maker of the note as is requisite to transfer the onus and put the defendant on proof contra is amply provided in the present case both by the similarity of name and address, unaccompanied as it is by any evidence that any other person bearing the same name lived in the district at the date of the making of the note, and also by all the circumstances deposed to which may well be construed as an admission, and by his calling the note sued on, as is alleged, " his own note " in contrast to the £40 note which admittedly he did not sign.

It may well be that none of these circumstances can be regarded as conclusive for the purpose of connecting the defendant with the note, and, if the defendant James had gone into the witness box and denied that the signature was his, it would have been perfectly competent for the learned judge to have held that the plaintiff had not established his case; but, in our opinion, the evidence tendered was ample to establish at least such a *prima facie* case as the judge was entitled to act upon in the absence of any evidence contra, especially as the defendant was in Court, and, was

(1) B. & Ald. 19.
(2) 3 C. & P. 613.
(3) 7 C.B. 861.
(4) 9 M. & W. 75.
(5) 1 Cr. & M. 511.

accordingly, available to have given such evidence if he could have truthfully done so.

In our opinion the verdict and judgment must stand and the appeal be dismissed with costs.

Solicitors for the plaintiff: *Daniel O'Rorke & Son.*

Solicitor for the defendant, James Byrne: *Thomas Elliott.*

J. McC.

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May 11.

DRENNAN v. BEECHEY AND OTHERS, TRUSTEES OF THE TRANSPORT AND GENERAL WORKERS' UNION AND MAGILL (1).

(1933. No. 4051.)

Trade union—Action for tort against trustees of trade union—Maintainability of action—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47) *section* 4, *sub-sections* 1 *and* 2—*Trade Union Act,* 1871 (34 *&* 35 *Vict., c.* 31) *section* 9—*R.S.C. Order* 25, *r.* 4.

The plaintiff sued the defendants, their servants or agents, for wrongfully and maliciously (1) inducing certain persons not to work for him ; (2) interfering with his lawful trade and business ; (3) interfering with certain contracts entered into by him ; (4) conspiring to induce certain persons not to work for him and to interfere with his lawful trade and business. The plaintiff alleged that the defendant M. was the servant or agent of the Union.

A notice of motion was served on behalf of the trustee defendants for an order that all further proceedings in the action against them be stayed, and that the action should be dismissed on the grounds that it disclosed no cause of action, or, alternatively, no reasonable cause of action against them, and that the proceedings were vexatious and were not *bona fide* brought to obtain any relief against them.

It was sworn on behalf of the trustee defendants, and not contradicted, that none of them resided in Northern Ireland, and that none of them committed the acts "in their capacity as "individuals, nor had they, or any of them, any knowledge of these "acts before the issue of the writ of summons." It was also sworn, and not contradicted, that the defendant M. was a shop steward in the employment of the Union, and that he was not a servant or agent of the trustees, nor under any duty to them, save so far as they acted officially for and on behalf of the Union.

It was also sworn that they did not know the defendant M. and that he had no authority from them to commit the acts complained of.

The Lord Chief Justice refused the defendants' motion with costs. The defendants appealed to the Court of Appeal.

Held, by the Court of Appeal (Andrews and Best, L.JJ.), reversing the decision of Moore, L.C.J., that all further proceedings must be stayed and the action dismissed with costs.

The liability imposed by section 4 (1) of the Trades Disputes Act, 1906 (which modified section 9 of the Trade Union Act, 1871),

(1) In the Court of Appeal before Andrews and Best, L.JJ.

on the trustees of a trade union is confined to matters in which some question is raised directly involving the property real or personal vested in them, and does not extend to cases where the property vested in them has not been instrumental in injuring the plaintiff.

APPEAL from an order of Moore, L.C.J., refusing an application on behalf of the defendant trustees that all further proceedings in an action against them should be stayed and the action dismissed.

The grounds of the application were that the statement of claim disclosed no cause of action, and that the action was vexatious and not *bonâ fide* brought to obtain relief against the defendants.

The plaintiff was a carrier and resided at Donaghadee, County Down, and the defendant, Magill, was alleged to be the servant or agent of the Transport and General Workers' Union.

On 26th September, 1933, a writ of summons was issued at the suit of the plaintiff against the Amalgamated Transport and General Workers' Union and the defendant, William Magill. The relief sought was the same as in the present action, viz., for damages "for that the defendants, their servants or agents, "wrongfully and maliciously procured and induced "certain persons not to work for the plaintiff, and "wrongfully and maliciously interfered with the "lawful trade and business of the plaintiff, and "wrongfully interfered with certain contracts entered "into by the plaintiff, and wrongfully and maliciously "conspired to procure and induce certain persons not "to work for the plaintiff and to interfere with the "lawful trade and business of the plaintiff."

That action was discontinued.

Before starting these proceedings the plaintiff's solicitor wrote a letter to the general secretary of the Amalgamated Union complaining of the action of the Union's "servant or agent (the defendant, Magill), in "preventing the plaintiff from carrying out the terms "of a contract for the supply of coal."

The plaintiff in his statement of claim alleged (*inter alia*) that Magill was the servant or agent of the Union, and that the defendants and each of them, their

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servants or agents, wrongfully committed the several acts complained of. On 16th February, 1934, a notice of motion was served on behalf of the trustee defendants for an order that all further proceedings in the action against such trustees be stayed, and that the action be dismissed on the grounds that the statement of claim disclosed no cause of action, or alternatively no reasonable cause of action against them, and that the proceedings were vexatious and not *bonâ fide* brought to obtain any relief against them.

The trustee defendants filed an affidavit in which it was sworn that none of the defendant trustees resided or were even temporarily resident in Northern Ireland at the time that the acts complained of in the statement of claim were committed, and that none of them committed the acts "in their capacity as individuals, "nor had they or any of them any knowledge of the "said acts before the issue of the writ of summons, "and also that the defendant, Magill, was a shop "steward in the employment of the Union, and that "he was not a servant or agent of the trustees or any "of them, nor was he under any duty to them either "individually or collectively, save in so far as they "act officially for and on behalf of the Union."

A further affidavit exhibited the Union's Rules, containing provisions in regard to the trustees, and further denied that any one of the trustees committed any of the acts alleged to have been committed in the statement of claim, and disclaimed all knowledge of the defendant, Magill, and that he was their agent or servant, and that he had any authority from them to commit the acts.

The Lord Chief Justice refused the motion, and the defendant trustees appealed to the Court of Appeal.

Murphy, K.C., and *McSparran* for the appellants:—

The plaintiff is attempting to get by a second action what he found it was impossible to get in his first action. He is also attempting to get rid of the provisions of the Trade Disputes Act, 1906.

The Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. There is also a jurisdiction conferred on the Court by Order 25, rule 4, to order a pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly.

In *Taff Vale Railway v. Amalgamated Society of Railway Servants* (1), Farwell, J., in his judgment said: "Sections 8 and 9 of the Act of 1871 expressly "provide for actions in respect of property being "brought by and against the trustees, and this express "intention impliedly excludes such trustees from being "sued in tort."

The Trade Union Act, 1876, does not affect the present case.

Magill was not a servant of the trustees, he was a servant of the Union.

In *Clarke v. Ferrie* (2), Andrews, L.J., referring to the decision of the House of Lords in *Vacher & Sons, Ltd. v. London Society of Compositors* (3), states that in his speech "Lord Moulton pointed out with char- "acteristic lucidity that the section conferred upon "trade unions such a general immunity in respect of "actions of tort as to make it obligatory upon the "court to stay such an action as soon as it is made "aware of its existence, for the section provides that "such an action should not be 'entertained,' and to "allow it to come to trial would be to entertain it."

In *Lawrance v. Lord Norreys* (4), the Court of Appeal held that independently of the General Orders, the Court has jurisdiction to stay vexatious actions.

The present action, not being one affecting property, the trustees cannot be sued.

If this action were to succeed such a result would in effect amount to a repeal of section 4 (1) of the Trades Disputes Act, 1906.

(1) [1901] A.C. 426, 431.
(2) [1926] N.I. 1, 11.
(3) [1913] A.C. 107, 127.
(4) 39 Ch.D. 213.

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We submit that the law is correctly stated in the Annual Practice, 1934, page 428, as follows :—" Apart " from all rules and orders, the court, has an inherent " jurisdiction to stay all proceedings before it which " are frivolous or vexatious or an abuse of its process, " see *Reichel v. Magrath* (1)," where it was held that there is an inherent jurisdiction in the High Court to strike out a statement of defence which is frivolous and vexatious and an abuse of the procedure.

It is also stated in the Annual Practice, 1934, page 428, that " This jurisdiction is in no way affected or " diminished by either r. 3 or r. 4 of Order 25. The " inherent jurisdiction is a most valuable adjunct to " the powers conferred on the court by these rules. " For under these rules the question before the court is " practically concluded by what appears the pleadings. " But when application is made to the inherent " jurisdiction of the Court, all the facts can be gone " into ; and affidavits as to the facts are admissible."

The present action is an attempt to make defendants liable for the acts of a servant of a trade union.

[They also referred to *Vinson v. The Prior Fibres Consolidated, Limited* (2).]

Black, K.C. (with him *Topping*) for the respondent :—

We submit that we are entitled to go to trial.

We rely on the judgment of the Court of Appeal in *Evans v. Barclays' Bank and Galloway* (3). In that case the defendants applied at Chambers to have the statement of claim struck out under Order 25, rule 4.

The Court of Appeal (Bankes and Scrutton, L.JJ., Sargant, L.J., dissenting) without expressing any opinion whether the duty alleged in the statement of claim existed, held that its existence was not so unarguable as to justify the Court in striking out the claim. Order 25, rule 4, was as Fletcher Moulton, L.J., said in *Dyson v. Attorney-General* (4), " not " intended to take the place of the old demurrer by " which the defendant challenged the validity of the

(1) 14 A.C. 665.
(2) [1906] W.N. 209.
(3) [1924] W.N. 97, 98.
(4) [1911] 1 K.B. 410, 418.

" plaintiff's claim as a matter of law," and the " power " of arresting an action and deciding it without trial is " one to be very sparingly used, and rarely, if ever, " excepting in cases where the action is an abuse of " legal procedure."

The right still exists to sue in respect of a tortious act not committed in contemplation or furtherance of a trade dispute. This was so prior to the Trade Disputes Act, 1906, and the right was preserved by that Act. Section 9 of the Trade Union Act, 1871, is wide enough to include any action brought against trustees the effect of which would be to affect or diminish union property in the hands of the trustees.

In *Curle v. Lester* (1), it was held that in an action to recover salary the trustees of a trade union are properly made defendants under section 9 of the Trade Union Act, 1871. In *Linaker v. Pilcher* (2) an action brought against the trustees of a trade union for a libel contained in a newspaper, of which as such trustees they were registered proprietors, it was held that the trustees could be sued in their capacity of trustees so as to bind the funds of a trade union.

We rely on the words used by Mathew, J., in delivering judgment, where he said: " In my opinion " ' property ' in section 9 of the Act of 1871 means, " property generally."

We submit that the present action is one touching the assets of the trade union.

We submit, that if it is established that Magill damaged the defendant, and that he was acting as a servant of the union, the trustees can be sued.

We rely on the words used by Lord Atkinson, in his speech in the House of Lords, in *Vacher & Sons, Limited v. London Society of Compositors* (3), where he said, dealing with section 4 of the Trade Disputes Act, 1906: " Judgments for damages against a trade " union for torts committed by its agent, in whatever " form the action might be brought, can only be " satisfied out of the property vested in the trustees; " and it was, I think, apprehended by the Legislature

(1) 9 T.L.R. 480.
(2) 70 L.J. (K.B.) 396, 400.
(3) [1913] A.C. 107, 124-5.

"that the wide and positive provisions of sub-s. 1 "might be taken as repealing in part s. 9 of the Act of "1871, and thereby conferring on the trustees im- "munity as absolute as that conferred upon the union. "This sub-section, while qualifying their liability to "some extent by the introduction of the provisions "common to ss. 1, 2 and 3, was, I think, passed for "greater caution to meet this possible danger, and, "save as to that qualification, to preserve unimpaired "the liability imposed on the trustees by s. 9 of the "Act of 1871."

The immunity conferred upon the trustees of a trade union was limited to acts done in contemplation or furtherance of a trade dispute.

It is stated in a footnote in *Halsbury, The Laws of England*, volume 27, page 666, that "probably *Linaker* "*v. Pilcher* (1) is still the law in all cases where no trade "dispute is in question; see *Vacher & Sons, Ltd. v.* "*London Society of Compositors* (2), where Lord "Haldane, L.C., pointed out the distinction between "the union and its trustees, and said that Parliament "appeared to have desired to preserve the liability of "the trustees even in the case of tortious acts com- "mitted by the union, subject to their exemption "when the act was committed in contemplation or "furtherance of a trade dispute."

In *Odger's Libel and Slander* (5th edition) it is stated that by sub-section 2 of section 4 of the Trade Disputes Act, 1906, it is provided that the trustees of a trade union may still be sued in the events provided for by section 9 of the Trade Union Act, 1871, except in respect of a tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute, *Rickards v. Bartram and Others* (3.)

We submit that the action against these defendants should not be stopped summarily.

[They also referred to *Conway v. Wade* (4).]

Murphy, K.C. (in reply):—

The action is vexatious, because there is no reasonable probability of success. At common law, this

(1) 70 L.J. (K.B.) 396.
(2) [1913] A.C. 107, 115.
(3) 25 T.L.R. 181.
(4) [1909] A.C. 506

action against these named parties, excluding Magill, is not maintainable.

In *Curle v. Lester* (1) the judgment was very short, and is not very illuminating as regards the present case. It is not an authority for the proposition contended for on behalf of the plaintiff.

In *Linaker v. Pilcher* (2) the trustees were the proprietors of the newspaper in which the libel was published. That was an action which touched and concerned the property of the defendant society. The trustee's common law liability was clear in *Linaker v. Pilcher* (2).

No such action as the present has ever been framed since the passing of the Trade Disputes Act, 1906.

We submit that the action should be stayed.

Cur adv. vult.

ANDREWS, L.J.: The plaintiff is a carrier who resides at Donaghadee, in the County of Down; and the defendant Magill is alleged by him to be the servant or agent of the Transport and General Workers' Union.

On 26th September, 1933, a writ of summons was issued at the suit of the plaintiff against the Amalgamated Transport and General Workers' Union and the defendant, William Magill. The relief sought was damages "for that the defendants, their servants "and/or agents, wrongfully and maliciously procured "and induced certain persons not to work for the "plaintiff, and wrongfully and maliciously interfered "with the lawful trade and business of the plaintiff, "and wrongfully interfered with certain contracts "entered into by the plaintiff, and wrongfully and "maliciously conspired to procure and induce certain "persons not to work for the plaintiff and to interfere "with the lawful trade and business of the plaintiff."

A notice of discontinuance of the said action, dated 20th October, 1933, was duly served by the solicitor for the plaintiff upon the solicitors for the Union and upon the solicitor for the defendant, Magill.

(1) 9 T.L.R. 480. (2) 70 L.J. (K.B.) 396.

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Prior to the institution of the above-mentioned proceedings the plaintiff's solicitor wrote a letter, dated 11th July, 1933, to the general secretary of the Amalgamated Union complaining of the action of the Union's "servant or agent, namely, the steward "attached to Branch No. 12 of the Union" (the defendant, Magill), "whereby the plaintiff was pre-"vented from carrying out the terms of a contract "for the supply of coal." In three distinct places in this letter Magill is referred to as "your servant" (i.e., the servant of the Union).

A few weeks after the service of the notice of discontinuance, namely, on 16th December, 1933, the writ of summons in the present action was issued. The relief claimed in it is identical with that sought in the previous discontinued proceedings, but the trustees of the Union are substituted for the Union as defendants.

The plaintiff delivered his statement of claim on 31st January, 1934, in which (amongst other things) it was alleged that the defendant Magill was the servant and/or agent of the Union, and that the defendants and each of them, their servants or agents, wrongfully committed the several acts complained of. On 16th February, 1934, a notice of motion was served on behalf of the trustee defendants for an order that all further proceedings in the action against such trustees be stayed, and that the action be dismissed on the grounds that the statement of claim discloses no cause of action, or, alternatively, no reasonable cause of action against them, and that the proceedings are vexatious and are not *bonâ fide* brought to obtain any relief against them.

In an affidavit filed in support of the application by one Laughlin McCurdy, the organiser of the Union for Northern Ireland, it is sworn that none of the defendant trustees reside or were even temporarily resident in Northern Ireland at the time that the acts complained of in the statement of claims were committed, and that none of them committed the acts "in their capacity as individuals, nor had they "or any of them any knowledge of the said acts before "the issue of the writ of summons of 26th September,

"1933." This statement is not contradicted. The same deponent averred that the defendant, Magill, is a shop steward in the employment of the Union, and that he is not a servant or agent of the trustees or any of them, nor is he under any duty to them either individually or collectively, save in so far as they act officially for and on behalf of the Union. In these circumstances it must be, and it is, in fact, admitted that the action is brought against the first named defendants in their capacity as trustees and officials of the Union for the alleged wrongful acts of the defendant Magill, whilst acting not as their agent and servant, but as the agent and servant of the Union.

One of the defendant trustees, Walter H. Green, also made an affidavit exhibiting the Union's rules containing provisions in regard to the trustees, the most important of which is that the funds and property of the Union shall be invested in the joint names of the trustees and dealt with by them as the General Executive Council shall direct. Other rules affecting the trustees relate simply to the safe custody of deeds, documents of title, and securities, the property of the Union, and to the investment of funds according to the instructions of the General Executive Council, who are responsible for the general administration of the Union's business. He denied that either he or any one of his co-trustees committed any of the acts alleged to have been committed in the statement of claim. He denied that either he or any of his co-trustees knew the defendant Magill, or that he was their agent or servant, or that he had any authority from them to commit the acts. Indeed, until the institution of proceedings they were unaware of his existence. These facts also stand unchallenged.

The application was heard by the Lord Chief Justice on 2nd March, 1934, when the learned judge refused the motion with costs. It is from this order that an appeal has been brought to this Court.

There is no controversy in regard to any material fact. The acts complained of are alleged to have been committed by the defendant Magill, who, it is asserted by the plaintiff in his statement of claim is the servant

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and/or agent of the Union. The defendant trustees are sued as trustees. Magill neither owed nor rendered them any duty or service. He was in no way under their control or answerable to them. They had no power to direct his actions, nor did they do so. They were not even aware of his existence.

In the foregoing circumstances Mr. Murphy is fully justified in saying that no liability on the part of the defendant trustees could exist at common law for the act of the servant or agent of a third party, namely, the Union, and that such liability must be found, if at all, in some statutory enactment.

The reason why the trustees are sued is easy to explain. The action against the Union was not maintainable owing to the provisions of section 4 (1) of the Trades Disputes Act, 1906, which was enacted in order to amend the law as it had been laid down by the House of Lords in the *Taff Vale Case* (1). It was because of this section that the first action was discontinued. The trustees were not parties to it. No charge was made against them either personally or as principals responsible for their agent's acts ; and they obviously never would have been sued in the present action had it not been for the statutory immunity which it was discovered after the issue of the first writ was enjoyed by the Union. Mr. Black, for the plaintiff, was characteristically frank when he opened his argument by stating that these particular defendants were sued because they were trustees of the Union, with the object of trying to reach the funds of the Union.

Now what is the duty of a Court hearing a motion of this character ? By Order 25, r. 4, the Court may order a pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defenc being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed or judgment to be entered accordingly. As a general rule it must be conceded that it is only in plain and obvious cases that recourse should be

(1) [1901] A.C. 426.

had to the summary process under this rule. *Mayor, etc., of the City of London v. Horner* (1). A pleading should not be struck out merely on the ground that the party responsible for it is not likely to succeed, but it is different if the Court is satisfied that he cannot succeed. In addition to the jurisdiction conferred by this rule the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court—a jurisdiction also to be exercised sparingly and not merely because of the improbability of the story told in the pleadings, but one in the exercise of which the Court is entitled to take into consideration all the circumstances of the case. The House of Lords approved of its exercise by the Court of Appeal in *Lawrance v. Lord Norreys and Others* (2), where the issue was one of fact. The whole history of the litigation in that case, including, as in the present case, earlier unsuccessful proceedings followed by substantial amendment, leading the Court to the conclusion that the story was a myth and a tissue of improbabilities which ought not to be sent to proof. So also in *Vacher & Sons, Ltd. v. London Society of Compositors* (3) where the issue was one of law and involved the consideration of the very same sections as are before us in the present case, the Court, being of opinion that the action against the Trade Union was incompetent, stayed all further proceedings against them.

Our jurisdiction therefore in a proper case is clear both upon Rules and authority.

How then does the matter stand on the Statutes ? Section 4 (1) of the Trades Disputes Act, 1906, contains an admitted prohibition of proceedings against a trade union in respect of any tortious act alleged to have been committed by or on behalf of a trade union ; and section 4 (2) of the Act declares that nothing in the section should affect the liability of the trustees of a trade union to be sued in the events provided for by the Trades Union Act, 1871, section 9, except in respect of any tortious act committed by or on behalf

(1) 111 L.T.R. 512.
(2) 39 Ch.D. 213 ; 15 A.C. 210.
(3) [1912] 3 K.B. 547 ; [1913] A.C. 107.

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of the union in contemplation or in furtherance of a trade dispute.

It is clear both from the language of this latter sub-section and from the general policy of the Act that the sub-section was not passed with the object of extending the then existing liability of the trustees of a trade union. On the contrary, whilst in general terms re-affirming the legal position of trustees under section 9 of the Act of 1871, it restricts their liability in cases in which the tortious act is committed in contemplation or in furtherance of a trade dispute. In my opinion the sub-section recognises clearly that the liability of trustees of a trade union arises under section 9 of the Act of 1871 ; that this liability may sometimes result from a tortious act ; and that some such tortious acts may be committed by or on behalf of the Union in contemplation or in furtherance of a trade dispute, whilst others may not be. If the Act be a tortious one of this character it is not excepted by sub-section (2) from the general words of immunity contained in sub-section (1). If it be not so committed no such protection exists.

As the first condition of the trustees' liability is that the case should fall within section 9 of the Act of 1871 I turn to a consideration of the material provisions of that Act. Section 7 makes it lawful for a registered trade union to purchase or take land upon lease not exceeding one acre in extent in the names of the trustees. Section 8 vests the property of a trade union whether real or personal in its trustees for the use and benefit of such trade union and the members thereof. By section 9 the trustees of a registered trade union are empowered to bring or defend any action or suit touching or concerning the property, right, or claim to property of the trade union. Accordingly, if the action touches or concerns the property of the trade union which is vested in them the trustees may sue or be sued. They are not only entitled to protect the property of the trade union so vested in them, but it is their duty to do so ; and, accordingly, they are proper parties to any action which touches or concerns it. Such actions may be in contract or they

may be in tort. The trustees must fulfil any contractual obligations in respect of it, such as the performance of a covenant in a lease. They must also refrain from the commission of any torts in respect of it. For example, they cannot so negligently use or maintain it as to injure others. Corresponding obligations also arise in connection with personal chattels of the Union which are likewise vested in the trustees. Trustees can sue or be sued in respect of the Union's property; but if the action does not touch or concern such property, and if they were not personally responsible for the commission of the alleged wrongful acts, they are not proper parties.

Does the present action "touch or concern the "property of the Union" within the meaning of the section? In my opinion it clearly does not. If "property" means specific property, as in my opinion it does, notwithstanding the dicta to the contrary of Mathew, J., in *Linaker v. Pilcher & Others* (1), clearly the present action does not fall within it. I refer to the learned judge's words as mere dicta, for the newspaper which had published the alleged libel in that case was vested in the trustees and constituted specific property. If, on the other hand, "property" means property generally, the action cannot come within the section unless either the Union is liable and their general property is in peril to satisfy any damages that may be awarded, or the trustees are by some recognised principle of the common law or by statute liable for the wrong alleged to have been committed. None of these alternatives exists in the present case. The Union is freed from liability by the express provisions of section 4 (1) of the Act of 1906; the trustees are not liable at common law, for Magill is admittedly not their agent but the agent of the Union; and, lastly, no statute has been or could be cited which so extends the general common law liability of principal and agent as to make the trustees legally responsible for the wrongful acts of a person who was neither their servant nor agent, and over whom they had no control.

(1) 17 T.L.R. 256.

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I am, accordingly, of opinion that no cause of action has been shown to exist against the trustees in the present case. To hold otherwise would be, indeed, to nullify entirely the principle of immunity conferred by section 4 (1) upon trade unions; for no effective protection would be afforded to them if the trustees of a Union, who would be entitled to satisfy the damages out of the Union's assets, were held liable for the very same tortious act in respect of which the Union was given express protection.

We ought not so to construe an Act of Parliament as to produce such an absurd result. In support of the conclusion at which I have arrived I think I may fairly cite the opinion of Lord Moulton who, when referring to the Act of 1906 in *Vachers' Case* (1), said:—"The plain meaning of the enactment is that, "however the trade union be sued, the Court shall not "entertain the action if it is in respect of a tortious "act alleged to have been committed by or on behalf "of the trade union."

I do not propose to refer to the judgment and speeches in the *Taff Vale Case* (2), which was decided before, and was, indeed, the reason for the enacting of section 4 (1) of the Act of 1906. Neither do I consider it necessary to make further reference to *Vachers' Case* (1). It must be admitted that certain judicial dicta were cited by Mr. Black which, expressed in somewhat general terms and divorced from their context, would appear at first sight to lend support to plaintiff's argument; but in my opinion such citation is not legitimate. I base my judgment upon the words of the statutes which I have examined and on my conviction that an immunity granted to trade unions almost thirty years ago, and which has ever since been generally accepted in the profession to be complete, was a real and not merely a nominal one; and, further, that parliament, when absolving a principal from liability for the tortious act of his agent, would never have committed or permitted the grotesque absurdity of throwing such liability on to the trustees of such

(1) [1913] A.C. 107, 127.
(2) [1901] A.C. 426.

principal, who had no voice in the control of the agent's actions, and who would, accordingly, be entitled to indemnify themselves out of those very assets which it was the policy of the Act of 1906 to protect. An action cannot be brought colourably under section 9 of the Act of 1871 which is prohibited by section 4 (1) of the Act of 1906.

On the admitted facts of the case this action neither could nor should succeed. It accordingly amounts in my opinion to an abuse of the process of the Court. The trustees are entitled to our protection, and should not be compelled to incur further expenses in its defence. All further proceedings must be stayed and the action dismissed with costs.

BEST, L.J.

BEST, L.J.: This is an appeal from the order of the Lord Chief Justice, dated the 2nd day of March, 1934, refusing an application on behalf of the defendant trustees that all further proceedings in this action against them should be stayed and that the action should be dismissed on the grounds that the statement of claim discloses no cause of action, or, alternatively, no reasonable cause of action, against them, and that the plaintiff's action and the proceedings thereunder are vexatious and not *bonâ fide* brought to obtain relief against the said defendants.

The plaintiff is a carrier and the defendants other than William Magill are trustees of the Transport and General Workers' Union, and the said William Magill is a servant and/or agent of the said Union.

The plaintiff complains that the defendants and each of them, their servants or agents, wrongfully and maliciously interfered with the plaintiff and his employees in the performance of certain contracts into which the plaintiff had entered. He further complains of other tortious acts alleged to have been committed by the defendants, their servants and agents, and in respect of all these acts complains of loss and damage, and claims against the defendants and each of them the sum of £750.

The writ in the present action was issued on the 16th day of December, 1933.

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In respect of the very acts now complained of a writ of summons had been issued on the 26th day of September, 1933. That writ was issued against the Transport and General Workers' Union and the said William Magill, and it claimed relief identical with that claimed in the present action but the proceedings thereunder were wholly discontinued by notice dated the 20th day of October, 1933.

By the rules of the Union its funds and property are invested in the joint names of the trustees and are dealt with by them as the General Executive Council of the Union shall direct. All deeds, documents of title, and securities for money of the Union, not in the possession of the Ministry of Health, are held by the trustees, who may take such measures for the safe custody and preservation thereof at the expense of the Union as they shall think fit, and they are responsible for the safe custody of all such deeds, documents and securities as are placed in their hands or under their control, and must produce them as required by the rules of the Union.

From an affidavit made by Walter Henry Green, one of the trustees, on behalf of himself and his co-trustees and with their authority, it appears that none of the trustees committed any of the acts alleged in the statement of claim to have been committed. Not one of these defendants was resident, even temporarily, in Northern Ireland when the acts complained of are alleged to have taken place, nor up to the institution of these proceedings was any one of them aware that it was alleged that such acts had been committed. The defendant, William Magill, is not known to any of the trustees, nor is he the servant or agent of any of them, and his existance was, until the institution of the present proceedings, unknown to them. He had no authority, express or implied, from any of the said trustees to commit any of the acts alleged, in the statement of claim, to have been committed.

In these circumstances it is submitted on behalf of the trustees that no cause, or, alternatively, no reasonable cause, of action against them is disclosed,

that the proceedings against them are frivolous and vexatious and are not brought *bonâ fide* for the purpose of obtaining relief against them but to capture in a circuitous way the property of the Union.

Mr. Black for the plaintiff, while admitting that the Union cannot be sued by reason of the provisions of section 4, sub-section 1, of The Trade Disputes Act, 1906 (6 Edwd. 7, c. 47), states that the defendants, who are trustees of the Union, have been sued with the avowed object, if possible, of reaching the funds of the Union. He submits that, on the true construction of the relevant statutes and having regard to decided cases, to dicta of high authority re-inforced by statements in text books, the action against the trustees is maintainable. He says that the power of the Court to stay actions, whether under its inherent jurisdiction or by virtue of Order 25 of the Rules of the Supreme Court, should be exercised with great care. *Evans v. Barclay's Bank* (1).

Admitting that this should be the attitude of the Court to a motion of this nature, it is equally clear that if the Court should come to the conclusion that the action is not maintainable, effect should be given to that view.

Mr. Black submits that the exemption given to trustees in sub-section 2 of section 4 of the Act of 1906 is an exemption given only in respect of tortious acts committed by or on behalf of the Union in contemplation or in furtherance of a trade dispute, that it leaves untouched the right of any person to sue these trustees in respect of a tortious act not committed in contemplation or in furtherance of a trade dispute, and that otherwise sub-section 2 would be meaningless.

Farwell, J., giving judgment in the case of the *Taff Vale Railway v. Amalgamated Society of Railway Servants* (2), is reported as saying that "sections 8 "and 9 of the (Trade Union) Act of 1871 expressly "provide for actions in respect of property being "brought by and against the trustees, and this express "intention impliedly excludes such trustees from "being sued in tort," and Mr. Black asks: If there is

(1) [1924] W.N. 97. (2) [1901] A.C. 426, 431.

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no liability on the trustees of a Trade Union to be sued in tort, what is the meaning of sub-section 2 of section 4 of the Act of 1906 ? It may be that Farwell, J., was wrong in suggesting that the sections ought to be construed in this way, but all that the learned judge decided in the case was that a Trade Union registered under the Trade Union Acts, 1871 and 1876, may be sued in its registered name, and this decision was upheld by the House of Lords. It is to be remembered also that no question directly touching the property of the Trade Union was involved in that action, which was brought to prevent the Union and its servants from watching and besetting a railway station of the plaintiffs during a strike for the purpose of persuading or otherwise preventing persons from working for the plaintiffs.

Section 9 of The Trade Union Act, 1871 (34 and 35 Vic. c. 31) empowers the trustees of any Trade Union registered under the Act to bring or defend, or cause to be brought or defended any action in any court of law or equity touching or concerning the property, right, or claim to property of the Trade Union, and in cases concerning the real or personal property of such Trade Union they may sue or be sued in their proper names without other description than the title of their office.

Does the present action touch or concern the property, right, or claim to property of the Trade Union ? If it does, then the action is properly constituted, but if it does not, the contention of the trustees is right and the action as against them should be discontinued. I find myself unable to say that anything in the present action touches or concerns the property, etc., of the Union. The case of *Linaker v. Pilcher & Others* (1), cited by Mr. Black, is no authority to the contrary. In that case a newspaper, which was carried on to protect the interests of the members of a trade union, was registered in the names of the trustees of the trade union as the proprietors. A libel upon the plaintiff was published in the news-

(1) 70 L.J. (K.B.) 396 ; 17 T.L.R. 256.

paper and he brought an action against the trustees. It was held, that though the trustees had not authorised the publication of the libel, yet, as the property of the newspaper was vested in them, they were liable; and that they were entitled to be indemnified out of the funds of the union, as the carrying on of the newspaper was not *ultra vires*.

It appears to me that inasmuch as the newspaper was the medium by which the libel was circulated, the property of the union, i.e., the newspaper, was as directly concerned in the action as a motor car belonging to the Union and vested in the trustees would have been concerned if an action claiming damages for its negligent management had been brought against the trustees.

Apart altogether from section 9 of the Act of 1871 there was a liability at common law upon the trustees, who were the registered proprietors of the paper, for publishing a libel on the plaintiff. It is true that Mathew, J., in giving judgment says that property in section 9 means property generally and not specific property, but as the newspaper in question was in fact specific property of the union vested in the trustees, his dictum as to the meaning of property was not, I think, necessary for the decision of the question before the Court.

Mr. Black says that an action which threatens the "assets of the Society" by a claim for damages touches or concerns the property of the Trade Union. I agree, if the action directly threatens those assets, i.e., if they are used in such a way as to contravene the maxim *Sic utere tuo ut alienum non laedas*. If land or a house or any other property, such as a motor car, belonging to the Union be so used as to injure a person or his property, that person may sue the trustees for the tortious act provided the act is not one done in contemplation or in furtherance of a trade dispute.

I am unable to see how the assets of the society can be threatened if the Union as such cannot be sued and, at the same time, the property of the Union vested in the trustees has not been so used as to produce the state of facts of which the plaintiff complains.

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Mr. Black relies upon the observations of Viscount Haldane in *Vacher & Sons, Ltd. v. London Society of Compositors* (1). The learned Lord Chancellor is there discussing the point made for the appellants that the proviso in sub-section 2 of section 4 of the Trade Disputes Act, 1906, should be read as a proviso to sub-section 1 restricting its operation. In rejecting this construction Lord Haldane says that the Act of 1871 enables trade unions to register, and provides by section 9 that the trustees of a registered trade union may sue or be sued as such in cases concerning the property of the trade union. The Legislature, he says, appears to have desired to draw a distinction between the union and its trustees and to preserve the liability of the trustees under this section, even in the case of tortious acts committed by the union, damages arising out of which might, as pointed out by Lord Lindley in his judgment in the *Taff Vale Case* (2), have been made effective against property in the hands of the trustees. These observations, coupled with the proviso in sub-section 2 of section 4, form the foundation of Mr. Black's argument that, although the Union *qua* Union can not be sued for any tortious act, yet its trustees may be sued for tortious acts committed by or on behalf of the Union provided such acts be not done in contemplation or in furtherance of a trade dispute. If this argument were to prevail, the protection given to the Union by section 4, sub-section 1, of the Act of 1906 would cease to have effect in cases in which tortious acts were committed by or on behalf of the Union provided such acts were not committed in contemplation or in furtherance of a trade dispute even though no question directly touching or concerning the property of the Union was involved.

I cannot think that this conclusion can properly be drawn from Lord Haldane's observations on the effect of section 9 of the Act of 1871. It is to be remembered that he is discussing that section with the *Taff Vale* decision (2), in mind, and that he refers to observations made by Lord Lindley in his judgment in the *Taff Vale Case* (2), but what Lord Lindley said in that case

(1) [1913] A.C. 107, 115. (2) [1901] A.C. 426.

was that if the trustees in whom the property of the society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the Trade Union.

I respectfully adopt the observations of Lord Atkinson in *Vacher & Sons, Ltd. v. London Society of Compositors* (1), on the meaning of section 4, sub-section 2, of the Act of 1906. He there says: "I think, "however, it is clear what the meaning and object of "the sub-section really is. A proceeding against the "trustees under section 9 of the Act of 1871 is in fact, "if not in form, a proceeding in rem. against the "property of the trade union. In that sense it is an "action against the union itself. Judgments for "damages against a trade union for torts committed "by its agent, in whatever form the action might be "brought, can only be satisfied out of the property "vested in the trustees; and it was, I think, appre-"hended by the Legislature that the wide and positive "provisions of sub-section 1 might be taken as prac-"tically repealing in part section 9 of the Act of 1871, "and thereby conferring on the trustees immunity as "absolute as that conferred upon the union. This "sub-section, while qualifying their liability to some "extent by the introduction of the provisions common "to sections 1, 2 and 3, was, I think, passed for greater "caution to meet this possible danger, and, save as "to that qualification, to preserve unimpaired the "liability imposed on the trustees by section 9 of the "Act of 1871."

What is that liability? I think, notwithstanding the observations of Mathew, J., in *Linaker v. Pilcher & Others* (2), that it is confined to matters in which some question is raised directly involving the property real or personal vested in the trustees *or which they allege ought to be vested in them*, and that it does not extend to a case like the present in which it is not,

(1) [1913] A.C. 107, 124.
(2) 70 L.J. (K.B.) 396; 17 T.L.R. 206.

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and cannot be, suggested that the property vested in the trustees has been instrumental in injuring the plaintiff.

Solicitor for the appellants: *J. C. W. Rea & Son.*
Solicitor for the respondent: *J. Morris McKee.*

J. McC.

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Mar. 26, 27. May 7.

Succession Duty—Person assessed residing in England—Whether right of appeal to High Court in England—Whether appeal a stay of Information by the Crown—Time of appeal—Where an appeal lies—"Accountable Party"—"Successor"—Succession Duty Act, 1853 (16 & 17 *Vict.*, *c.* 51) *sections* 1, 2, 5, 7, 10, 12, 42, 44, 45 *and* 50—*Customs and Inland Revenue Act*, 1888 (51 *Vict.*, *c.* 8) *section* 21—*Finance Act*, 1894 (57 & 58 *Vict.*, *c.* 30) *section* 1—*Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8) *section* 58 (2) *Proviso* (*a*)—*Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67) *sections* 21, 61, 69 (*a*), (*f*) and (*g*)—*Government of Ireland* (*Adaptation of the Taxing Acts*) *Order*, 1922, *No.* 80, *Clauses* 3, 11, 12, 13, 14.

The defendant, who resided in London, was assessed as an accountable party for succession duty in respect of the cesser of a moiety of an annuity of £2,000, charged upon lands situate in Northern Ireland. He gave notice of his intention to appeal to the High Court of Justice in England under section 50 of the Succession Duty Act, 1853.

Held, by the Court of Appeal (reversing the decision of the King's Bench Division) (1) That an appeal under section 50 of the Succession Duty Act, 1853, lies only where the appellant is an accountable party, and the question at issue is merely the question of the amount of the assessment, but does not lie where there is a denial of liability;

(2) That notice of appeal under section 50 does not operate as a stay of, or a bar to, the Crown's proceedings by information;

(3) That the limitation of time for furnishing a statement of the grounds of appeal under section 50 being statutory cannot be extended.

Held, also, (Megaw, J.) that there is an implied repeal of section 50 by the Government of Ireland Act, 1920, so far as section 50 gives any appeal to the English Courts over Northern Ireland succession duty.

Held, also, that the exemption from the payment of the one per centum succession duty payable under the Succession Duty Act, 1853, s. 10 and the additional ten shillings per centum payable under the Customs and Inland Revenue Act, 1888, only arises where estate duty is payable under the Finance Act, 1894, and the principal value of the estate does not exceed £15,000.

(1) In the Court of Appeal before Andrews, Best, L.JJ., and Megaw, J.

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APPEAL from a decision of the King's Bench Division, dated 31st January, 1934, dismissing with costs an Information brought by the Attorney-General on behalf of His Majesty to recover the sum of £190 15*s.* 10*d.* succession duty alleged to be payable by the respondent in respect of a moiety of an annuity of £2,000 per annum.

The facts are fully stated in the judgment of Andrews, L.J.

The *Attorney-General* (*A. B. Babington, K.C.*) and *J. G. Dougherty* for the Ministry of Finance:—

The respondent cannot rely upon section 12 of the Succession Duty Act, 1853, by which "no person "shall be chargeable with duty upon the extinction "or determination of any charge, estate or interest "created by himself." The charge created by the indenture of 18th June, 1912, was created not by the respondent, but by his father, Sir Otto Jaffé.

Section 50 of the Succession Duty Act, 1853, in so far as it gives to taxpayers resident in England and Scotland any right of appeal to the Courts in England or Scotland according to the place in which they reside in respect of succession duty assessed upon property situate in Northern Ireland, is impliedly repealed by the Government of Ireland Act, 1920. Before the passing of the Act of 1920, Ireland formed an integral part of the United Kingdom, taxes were imposed and collected by the enactments of one legislature, the Parliament of the United Kingdom. There was one exchequer and succession duty was under the management of the Commissioners of Inland Revenue which had control over all parts of the United Kingdom.

Since the Government of Ireland Act, 1920, Northern Ireland has a separate parliament with powers to legislate with respect to imposing, charging, levying and collecting taxes with certain specified exceptions within its jurisdiction and the proceeds of such taxes are paid into a separate exchequer, the Consolidated Fund of Northern Ireland. Succession duty is not a reserved tax and is one over which the Parliament of

Northern Ireland has full power of assessment and collection.

By section 69 of the Government of Ireland Act, 1920, the King, by Orders in Council, was given power to make adaptation orders. The legislature in giving this power to make adaptation orders contemplated in express terms that the Government of Ireland Act, 1920, would repeal by implication some earlier enactments. [He referred to Maxwell on *The Interpretation of Statutes*, pages 292 and 293.]

The exercise in Northern Ireland by the English Courts of the jurisdiction conferred on them by section 50 of the Succession Duty Act, 1853, would be entirely contrary to the jurisdiction conferred upon the Courts of Northern Ireland by the Government of Ireland Act, 1920. *Attorney-General v. Great Southern and Western Railway Company of Ireland* (1). The right to appeal given by section 50 of the Act of 1853, if it still exists, is not an exclusive right. It does not prevent the Crown from proceeding by way of information to recover the amount of succession duty assessed. The appeal procedure under section 50 is only available to a party disputing the amount, it may not be relied upon where total exemption is claimed.

Jaffé the respondent :—

Having duly served notice of my intention to appeal to His Majesty's High Court of Justice (in England), King's Bench Division, against the assessment in pursuance of the provisions of section 50 of the Act of 1853, the present information is not maintainable. Since no time is specified in section 50 within which such appeal is to be presented it may be preferred at any time ; alternatively it may be brought within a reasonable time. It is only after such appeal has failed that a right of action accrues to the Crown which it can enforce.

Section 50 is intimately bound up with the right of appeal. The right to appeal cannot be taken away and the right to tax remain. For many years prior

(1) [1925] A.C. 754.

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to the Act of Union there were separate exchequers. By section 1 of the Crown Debts Act, 1801, which is still in force, when upon any account declared or recorded in the Court of Exchequer in England, or on judgment of that Court, any debt shall be due to His Majesty, a copy of such account shall, on application, be exemplified and transmitted to the Court of Exchequer in Ireland, where it shall be enrolled, and process issued against the debtor's body and effects. The word "Ireland" now reads "Northern Ireland." Northern Ireland is still a part of the United Kingdom. It is merely a matter of account between the two countries.

The jurisdiction of the Supreme Court cannot be removed without express words. Section 61 of the Government of Ireland Act, 1920, provides that "all "existing laws, institutions and authorities in Ireland, "whether judicial, administrative or ministerial, and "all existing taxes in Ireland, shall, except as other-"wise provided by this Act, continue as if this Act "had not passed. . . ." The words "except as "otherwise provided" cannot refer to the right to appeal under section 50 of the Act of 1853. [He referred to the judgment of Lord Sankey, L.C., in *The Performing Right Society v. Bray U.D.C.* (1). In *State v. Little* (2) it was held that the Fugitive Offenders Act, 1881, continued to be of full force and effect in the Irish Free State by virtue of the provisions of Article 73 of the Free State Constitution (which corresponds to section 61 of the Act of 1920) and that it was not inconsistent with the Constitution. If there is a *casus omissus* in an Act of parliament in favour of the subject it is not for the Court to supply the omission.

As the principal value of the property passing on the death of Dame Pauline Jaffé was under £15,000, no succession duty is payable by reason of the provisions of section 58 (2) Proviso (*a*) of the Finance (1909-10) Act, 1910.

The Attorney-General (in reply):—

The taxpayer in order to rely upon section 50 of the Act of 1853 must be an "accountable party." A

(1) [1930] I.R. 509, 528-9. (2) [1931] I.R. 39.

person who denies all liability to succession duty does not come within section 50.

One country will not enforce the revenue laws of another country. *Municipal Council of Sydney v. Bull* (1).

Cur. adv. vult.

ANDREWS, L.J.

ANDREWS, L.J. : This is an appeal from an order of the Lord Chief Justice, dated 31st January, 1934, by which, with the consent of the parties, the learned judge ordered that the facts in this case should be taken as found according as they appear in the reported case of the *Attorney-General v. Jaffé* (2), and thereupon he gave judgment for the defendant with costs to be paid by the Ministry of Finance for Northern Ireland.

The information of the Attorney-General, dated 8th November, 1933, claims that the defendant is indebted to His Majesty in the sum of £190 15*s.* 10*d.* with interest from 30th June, 1933, for succession duty payable in respect of a moiety of an annuity of £2,000 per annum created by an indenture of conveyance, dated 18th June, 1912, made between Otto Jaffé of the one part and the defendant and William Edward B. Jaffé of the other part, which sum had been duly assessed upon the defendant on 29th June, 1932.

The defendant, who appeared under protest to the writ of subpoena, filed a defence which was also stated to be " under protest in order to preserve defendant's " right to object to the jurisdiction." By this defence he denied in general terms that any succession duty was payable or that it was duly assessed, and further pleaded, as amended by the order of 31st January, 1934, that, having duly served notice of his intention to appeal to His Majesty's High Court of Justice (in England), King's Bench Division, against the assessment in pursuance of 16 & 17 Vict., c. 51, s. 50, the information was not maintainable. In his reply the Attorney-General joined issue, and further submitted that no appeal to the High Court of Justice in England against the assessment was competent, and, alternatively, that such an appeal was no bar to these proceedings.

(1) [1909] 1 K.B. 7. (2) 1933 N.I. 189.

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The earlier report of the case to which reference is made in the order of 31st January, 1934, relates to an application which was made by the Attorney-General on 6th March, 1933, to the Lord Chief Justice and Brown, J., for liberty to issue and serve a writ of subpoena out of the jurisdiction to recover the amount of the assessment. That Court held that the right of appeal under section 50 of the Succession Duty Act, 1853, was not repealed by The Government of Ireland Act, 1920, and, accordingly, that in their opinion, no order should be made. On appeal to this Court we considered it unnecessary to determine whether or not such a repeal had been effected, as we were of opinion, over-ruling *R. v. Gardiner* (1), that it was not necessary for the Crown to come to the Court for liberty to issue and serve writs of subpoena in revenue matters out of the jurisdiction in any part of the United Kingdom, and that for that reason no order should be made. In our judgment we expressly stated that when the writ had been issued and served in the usual way it would be competent for the defendant, who had not been before us and who was not bound by our decision, to take such steps, if any, as he might be advised in reference thereto.

When the matter came before the Lord Chief Justice on 31st January, 1934, on the hearing of the present information, he was informed, quite correctly, that the decision given by the Court consisting of himself and Mr. Justice Brown that no repeal of section 50 of the Act of 1853 had been effected by the Act of 1920 stood unquestioned by this Court, as in the view which we had taken it was unnecessary for us to consider the question. I consider, however, that, having regard to the elaborate arguments addressed to us (without objection upon either side) on several distinct and different issues, it was most unfortunate that the learned Lord Chief Justice should have been informed, as he was by the learned Attorney-General, that "the "issue is identical with that decided in the Divisional "Court in that Report," and that he could only formally ask the Court to reverse their own decision,

(1) [1920] 2 I.R. 339.

and that he did not propose to argue it further pending an appeal. The attitude thus assumed by the Attorney-General not only deprived the Lord Chief Justice of the opportunity of expressing his judgment upon these distinct and relevant issues, but, as a consequence, has converted this Court in determining them into a Court of first instance.

The claim for duty arises upon the cesser of an annuity of £2,000 created by the conveyance of 18th June, 1912. By this deed Sir Otto Jaffé, after expressing that he was desirous of vesting certain hereditaments and premises, some of which were held in fee farm and the remainder under lease, in his sons the defendant and William Edward B. Jaffé, subject as thereinafter mentioned, in pursuance of such desire and in consideration of natural love and affection and in consideration of the covenants and conditions on their part therein contained, conveyed the premises unto his said sons as tenants in common. Then followed two further provisions introduced by, and both of which, as a matter of legal construction, are in my opinion governed by the words:—"And this "Indenture Further Witnesseth that in consideration "of the premises . . ." The first of these provisions is a joint and several covenant by the defendant and his brother with their father that they would during the remainder of the lifetime of their mother, Dame Pauline Jaffé, pay to her an annuity of £2,000 at the times and in the manner therein mentioned. The second provision—a charge—is in the words following: "And the said Arthur Jaffé and William Jaffé hereby "charge the hereditaments and premises hereby "conveyed and assigned with the payment of the said "annuity and every part thereof." The deed was executed only by the said Sir Otto Jaffé.

Subsequent dealings with portion of the property comprised in the conveyance admittedly do not affect the Crown's rights, if any, to succession duty as against the defendants, and, accordingly, need not be further referred to.

When the learned Attorney-General was proceeding to open the appeal before us the defendant took the

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preliminary point that our decision of 20th June, 1933, to the effect that it is unnecessary for the Crown to come to the Court for liberty to issue and serve writs of subpoena in revenue matters out of the jurisdiction in any part of the United Kingdom, was wrong in so far as it related to the service of such writs. He submitted that his rights in this regard were fully preserved by the entry of his appearance under protest, and he referred us to several authorities in support of this contention. Whilst there is no doubt as to the right of a defendant to appear under protest without prejudice to an application to set aside a writ or service of a writ, it did not appear to us that the defendant's objection in either his appearance or defence was directed to this point, but rather to the general question of jurisdiction arising under section 50 of The Succession Duty Act, 1853, pleaded in paragraph 3 of the defence. We were further of opinion that any such point as to irregularity of service should have been taken, if at all, without delay and, in any event, prior to the trial, by notice of motion under Order XII, r. 46 (which is made applicable to Revenue proceedings by Order 68, r. 3). We, accordingly, held that in the circumstances the point as to alleged irregularity must be taken to have been waived.

Dame Pauline Jaffé, the annuitant, died on the 16th of August, 1929, and the claim of the Crown is alleged to have arisen by the resulting cesser of her annuity.

Succession duty is a tax (created by the Act of 1853) placed on the gratuitous acquisition of property which passes on the death of any person by means of a transfer from one person, who is called the predecessor, to another, who is called the successor. By section 2 of the Act every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person . . . shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition a "succession" (i.e., as defined by section 1, "property "chargeable with duty under the Act"); and the

term "successor" shall denote the person so entitled; and the term "predecessor" shall denote the settlor. . . . or other person from whom the interest of the successor is or shall be derived. Different sections of the Act relate to and affect different types of "succession"; but the section with which we are most concerned in the present case is section 5 which (so far as is material) provides that where any property shall . . . be subject to any charge . . . determinable by the death of any person . . . , the increase of benefit accruing to any person or persons upon the extinction or determination of such charge shall be deemed to be a succession accruing to the person, or the persons, if more than one, then entitled beneficially to the property or the income thereof, according to his or their respective estates or interests therein, or beneficial enjoyment thereof; and the person or persons from whom such successor or successors respectively shall have derived title to the property so charged shall be deemed to be the predecessor or predecessors, as the case may be.

Section 7 also appears to me to be relevant to the present case. It provides that where any disposition of property, not being a *bonâ fide* sale, and not conferring an interest expectant on death on the person in whose favour the same shall be made, shall be accompanied by the reservation or assurance of or contract for, any benefit to the grantor, or any other person, for any term of life or for any period ascertainable only by reference to death, such disposition shall be deemed to confer at the time appointed for the determination of such benefit an increase of beneficial interest in such property, as a succession equal in annual value to the yearly amount or yearly value of the benefit so reserved, assured, or contracted for, on the person in whose favour such disposition shall be made.

Section 10 fixes the rate of duty on successions according to the relationship existing between the predecessor and the successor. Then follows section 12 upon which the defendant so strongly relies. This section provides that where any person shall take a succession under a disposition made by himself, then, if at the date of such disposition he shall have been

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entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of this Act, and such person shall have died during the continuance of such disposition, he shall be chargeable with duty on his succession, at the same rate as he would have been chargeable with if no such disposition had been made; but a successor shall not in any other case be chargeable with duty upon a succession taken under a disposition made by himself, and no person shall be chargeable with duty upon the extinction or determination of any charge, estate, or interest created by himself, unless at the date of the creation thereof he shall have been entitled to the property subjected thereto expectantly on the death of some person dying after the time appointed for the commencement of the Act.

I am clearly of opinion that this section has no application to the present case. In the first place, the disposition contained in the conveyance of 18th June, 1912, was not made by the defendant but by his father. Secondly, the defendant was not at the date thereof entitled to the property expectantly on the death of any person. Thirdly, it follows, from the above that no such person died during the continuance of the disposition. Fourthly, and of greatest importance, the defendant's succession was not taken under a disposition made by himself. At the date of the conveyance of 18th June, 1912, the defendant's father was absolute owner of the freehold in part of the property and of the leasehold interest in the remaining part of it. He made a conveyance of it to his sons. Did the father or the sons create the charge? It seems to me impossible to contend, as the defendant does, that it was made by himself and his brother, neither of whom executed the deed. Further, if it be said that in form the charge purported to have been made by the defendant and his brother, I am unable to hold, as the defendant asks us to do, that this was a wholly independent action on their part which they were under no obligation to their father to fulfil. I have already called attention to the form of the

conveyance. The recital of Sir Otto Jaffé's desire is not for an absolute vesting of the property in his sons but for a vesting "subject as hereinafter mentioned." The conveyance is expressed to be made in consideration of the covenants and conditions on his sons' part; and, as I have also mentioned, on the true construction of the deed both the covenant by the defendant and his brother to pay the annuity to their mother and the charge in her favour were made "in consideration of "the premises," namely, in consideration of the conveyance of the property to them. In substance and in reality, therefore, the charge was not an independent charge made by the sons, but the whole conveyance, including the charge, was a settlement made by the father; and, if authority be required as to the duty of the Court in a case of this nature to look at the true nature and substance of the transaction rather than at the mere form of the instrument, it will be found in *Attorney-General v. Maule* (1), and in several other cases which are referred to in *Hanson on Death Duties*, 6th Edition, 652 *et seq.*

The defendant, however, has pressed upon us another and entirely independent line of defence based on section 50. Now, as this section can only be relied upon, if at all (i.e., if unrepealed) by an "accountable party," it is necessary to consider first who is regarded as an "accountable party" under the Act. Section 42 provides that the duty imposed by the Act shall be a first charge on the interest of the successor . . . and shall be a debt due to the Crown from the successor. Section 44 enacts that "the "following persons beside the successor shall be "personally accountable to Her Majesty for the duty," and then follows an enumeration of certain classes of persons not material to the present case, every such person thereby made accountable being declared to be a debtor to Her Majesty in the amount of the unpaid duty for which he shall be so accountable. By section 45 the persons "made accountable for the payment of "duty in respect of any succession" are compelled to deliver to the Commissioners (*inter alia*) "a full and

(1) 56 L.T.N.S. 611, 615.

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"true account of the property for the duty whereon "they shall respectively be accountable, and of the "value thereof, and of the deductions claimed by "them . . . and all such other particulars as shall be "necessary or proper for enabling the Commissioner "fully and correctly to ascertain the duties due." Thereupon, it becomes the duty of the Commissioners under the section to assess the succession duty on the footing of such account and of the estimate originally delivered, if satisfied with same ; and, if not so satisfied, they are empowered to cause an account and estimate to be taken by any person appointed by themselves.

The materiality of these provisions for our present purposes is this—that the right of appeal created by section 50 is given only to an "accountable party "dissatisfied with the assessment of the Commissioners." A person who seeks to rely upon the section must, therefore, be a successor or other person accountable for succession duty. Such person, after giving within the prescribed times notice in writing of his intention to appeal and a statement of the grounds of such appeal, may appeal by petition to the Court of Exchequer in England, Scotland, or Ireland, according to the place in which the appellant shall be resident. The Court hearing the appeal is empowered to direct for the purposes of such appeal any inquiry, valuation, or report from an officer of the Court or other person. The section concludes with a proviso that where the sum in dispute in respect of the assessment does not exceed £50, the appeal can be taken to the County Court for the county or division in which the appellant shall be resident or the property be situate.

Now I am clearly of opinion that the granting of the right of appeal to an accountable party presupposes the existence of a liability, and that the only question in issue is, as the learned editor of the 6th Edition of *Hanson on Death Duties* states, "as to the value of the "succession or the details of the account"—i.e., a question as to the quantum of the amount. This view is confirmed by the power of the Court to direct an "inquiry, valuation, or report," and by the power to have the matter determined in the County Court

where " the sum in dispute " does not exceed £50. In my opinion, therefore, the defendant, who denies all liability in respect of the assessment, cannot rely upon the appeal procedure under this section for the purpose of having the question of his alleged total exemption determined.

There are other reasons also why the defendant cannot successfully rely upon this section. In the first place, he failed to furnish a statement of the grounds of his appeal within the prescribed period of thirty days. As this is a statutory limitation of time, no question of its extension can arise. Secondly, the section contains no words which render the obtaining of a decision upon such appeal when brought a condition precedent to recovery by information ; and, although in a proper case and in due observance of the obligations involved in the principle of the comity of courts, information proceedings might be stayed until an appeal had been determined, the Court well might in the exercise of its discretion, refuse to do so, having regard to the fact that, as we are told in *Hanson* at page 770, " proceedings by way of appeal under this " section are now almost unknown." It is enough, however, to say that in the present case proceedings have not been stayed. There is yet a further answer to the plea founded upon this section. In my opinion a party who relies upon the section must do something more than serve a notice of intention to appeal and a statement of the grounds. I unhesitatingly reject Mr. Jaffé's contention that he is under no obligation to serve a petition of appeal, and that, by the service of a mere notice he can effectually hold up all proceedings by the Attorney-General indefinitely. The section refers in express terms to appeal by petition ; and, in the absence of any provision as to time, it obviously contemplates its service within a reasonable time in order that the King may not permanently be deprived of his revenues. On the question of reasonable time no evidence was given before the Lord Chief Justice ; but, accepting all that Mr. Jaffé stated in his argument before us as if it had been proved, I am quite unable to hold, as, alternatively, he asked us

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to do, that a reasonable time has not yet elapsed. There is, in my opinion, no explanation or justification whatever for the delay which has taken place if the defendant ever genuinely intended to prosecute an appeal in the English Courts. It is idle for him to suggest that his doing so might have been construed as a contempt of Court or as in any degree reprehensible, as no such charge could have been made against a litigant who was only exercising his lawful statutory rights with a view to establishing his defence.

One further answer of the Attorney-General to the defence based on section 50 is that that section has been impliedly repealed by the Government of Ireland Act, 1920. This, as already mentioned, was really the only point which the Attorney-General submitted to the Lord Chief Justice, and which under the circumstances was, with his assent finally ruled against him.

Having regard to the views which I have already expressed, it is really unnecessary for me to state any definite or concluded opinion upon the question which has been fully considered by my colleague, Megaw, J., in the judgment which he will deliver. I shall content myself with saying that I think it extremely probable that the English Courts, if appealed to, would decline jurisdiction to deal with an assessment which was not made, as the section provides, by " the Commissioners " (i.e., by the Commissioners of Inland Revenue) but by the Ministry of Finance for Northern Ireland, relating to a transferred tax which affects property in Northern Ireland, is payable into the Exchequer of Northern Ireland, and is exclusively under the control of the Legislature of the Parliament of Northern Ireland.

Mr. Jaffé's last point, which is contained in numbers 3 and 4 of his " Grounds of Appeal," dated 16th November, 1932, is that, as the principal value of the property passing on the death of Lady Jaffé was under £15,000, no succession duty is payable by reason of the provisions of section 58 (2) (*a*) of the Finance (1909-10) Act, 1910. This argument is quite unsustainable. By section 10 of the Act of 1853 a duty of one per cent. was imposed on the succession of lineals.

Section 21 of the Customs and Inland Revenue Act, 1888, imposed an additional duty of one half per cent. These are the amounts claimed by the Attorney-General in the present case. The Finance Act, 1894, which created the new duty known as estate duty, provided that the existing duties mentioned in the First Schedule to the Act (including both the one and the additional one-half per cent. succession duty above-mentioned) should not be levied in *respect of property chargeable with such estate duty*. Section 58 (2) of The Finance (1909-10) Act, 1910, re-imposed the one per cent. succession duty subject to certain provisoes of exemption, the first of which was "where the principal value of the property passing "on the death of the deceased in *respect of which estate* "*duty is payable* . . . does not exceed £15,000, "whatever may be the value of the . . . succession." Now, whether reliance be placed on the exemption contained in the Act of 1894 or upon that contained in the Act of 1910, the essential condition of immunity from liability is that the property passing on the death should be chargeable with estate duty. This condition the defendant appears to me completely to ignore in his argument; and, as admittedly no estate duty was payable on the death of Lady Jaffé in respect of any property passing on her death, the exemption claimed cannot be sustained.

For the reasons which I have stated I am of opinion that the defence to this information fails and the appeal must be allowed. The Attorney-General will have judgment for the sum of £190 15*s*. 10*d*. with costs, including the costs of this appeal.

BEST, L.J.: This is an appeal from the judgment of the Lord Chief Justice, dated the 31st day of January, 1934, dismissing with costs an information brought by the Attorney-General on behalf of His Majesty to recover the sum of £190 15*s*. 10*d*. succession duty alleged to be payable by the defendant in respect of a moiety of an annuity of £2,000 per annum created by an indenture, dated the 18th day of June, 1912, and made between Sir Otto Jaffé of the one part and

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the said Arthur Daniel Jaffé and William Edward Berthold Jaffé of the other part, which said sum was duly assessed upon the said Arthur Daniel Jaffé on the 29th day of June, 1932, and the Attorney-General asks that the said sum, together with interest thereon at four per cent. per annum from the 20th day of June, 1933, till judgment, may be adjudged to His Majesty.

The defendant, who delivered his defence to the information under protest in order to preserve his right to object to the jurisdiction, denies that any succession duty is payable in respect of the moiety of the annuity referred to in the information as alleged in said information or at all, he denies that succession duty was duly assessed as alleged or at all, and he says that he having duly served notice of his intention to appeal to His Majesty's High Court of Justice (in England), King's Bench Division, against the said alleged assessment in pursuance of the provision of the Statute 16 & 17 Victoria, c. 51, s. 50, made in that behalf, the said information is not maintainable.

In addition to joining issue, the Attorney-General replies that no appeal to the High Court of Justice in England against the said assessment is competent, and in the alternative, that such appeal is no bar to these proceedings.

If defendant's contention be correct that no succession duty is payable in respect of the moiety of the annuity referred to in the information, no other question arises for decision.

By the said indenture of the 18th day of June, 1912, it was witnessed that in pursuance of his desire to vest in his sons the said Arthur Jaffé and William Jaffé the hereditaments and premises thereinafter conveyed subject as thereinafter mentioned and in consideration of natural love and affection for his said sons and in consideration of the covenants and conditions on their part therein contained, the said Sir Otto Jaffé as beneficial owner conveyed unto the said Arthur Jaffé and William Jaffé, their heirs and assigns, the hereditaments and premises described in the first schedule thereto to hold unto the said Arthur Jaffé and William

Jaffé their heirs and assigns for ever as tenants in common subject as therein, and that for the considerations aforesaid the said Sir Otto Jaffé as beneficial owner conveyed and assigned unto the said Arthur Jaffé and William Jaffé their executors, administrators and assigns the hereditaments and premises in the second schedule thereto to hold unto the said Arthur Jaffé and William Jaffé their executors, administrators and assigns as tenants in common for all the residue to come and unexpired of the term of 10,000 years granted by an indenture of lease of 12th July, 1890, subject as therein, and it was further witnessed that in consideration of the premises the said Arthur Jaffé and William Jaffé jointly and severally covenanted with the said Sir Otto Jaffé that they the said Arthur Jaffé and William Jaffé their heirs, executors, administrators and assigns would during the remainder of the lifetime of their mother, Dame Pauline Jaffé, pay to her an annuity or yearly sum of £2,000 commencing from the 1st day of January, 1913, said annuity to be payable to the said Dame Pauline Jaffé by equal half-yearly payments clear of all deductions except income tax on the 1st day of January and 1st day of July in every year, the first half-yearly payment thereof to be made on the 1st day of July, 1913, and the said Arthur Jaffé and William Jaffé by said indenture charged the hereditaments and premises so conveyed and assigned with the payment of the said annuity and every part thereof.

Section 10 of the Succession Duty Act, 1853 (16 & 17 Vict., c. 51), is the section under which duties on successions are levied and payable. By section 1 of the Act the term "Succession" shall denote any property chargeable with duty under this Act, and it is pointed out by the authors of *Hanson's Death Duties* in the notes to the section that the term denotes the actual property to which the successor is entitled in the same way that the term "legacy" is taken to mean the money bequeathed, and not the act of bounty.

The next matter for consideration is as to the kinds of disposition of property which confer succession. Section 2 of the Act supplies the answer. I omit

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words that are not applicable to the present case :—

> Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act . . . shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition . . . a "succession"; and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote the settlor . . . from whom the interest of the successor is or shall be derived.

By the deed of 18th June, 1912, Sir Otto Jaffé made a disposition of the property described in the first and second schedules thereto in favour of his sons, but in reality subject to an annuity of £2,000 payable by them to their mother; that the disposition of the property to them was made subject to the payment of the said annuity is clear from the fact that the conveyance or assignment of the property is stated to be in consideration of the covenants and conditions on the part of the sons contained in said indenture, and one of those covenants is that they will during the remainder of the lifetime of their mother pay to her the said annuity of £2,000. It follows then that upon her death the sons became beneficially entitled to the property freed from the payment of the annuity, so that Sir Otto Jaffé conferred upon them a "succession" an augmentation of income arising on their mother's death; they are "successors" as defined in section 2 and he is the "predecessor" or settlor from whom the interest of the "successors" has been derived.

The increase of benefit accruing to Sir Otto's sons upon the determination by death of their mother's interest in the annuity is deemed by section 5 of the Act to be a succession accruing to them, and the person from whom they as successors have derived title to the property charged is to be deemed to be the predecessor.

Further, section 7 of the Act provides that where any disposition of property, not being a *bonâ fide* sale and

not conferring an interest expectant on death on the person in whose favour the same shall be made, shall be accompanied by the reservation or assurance of or contract for, any benefit . . . to any other person . . . for any period ascertainable only by reference to death, such disposition shall be deemed to confer at the time appointed for the determination of such benefit an increase of beneficial interest in such property, as a succession equal in annual value to the yearly amount or yearly value of the benefit so reserved, assured or contracted for, on the person in whose favour such disposition shall be made.

Here there was a disposition of the property which was not a sale and which did not confer an interest expectant on death on either of the sons, but which was accompanied by the reservation or assurance of or a contract for a benefit to Dame Pauline Jaffé, ascertainable by reference to her death, and therefore the disposition is deemed to confer at her death an increase of beneficial interest in the property as a succession equal in annual value to the yearly amount or yearly value (£2,000) of the benefit so reserved, assured or contracted for, on the person (the two sons), in whose favour the disposition was made. From this section, as well as from section 5, applied to the facts of the case, it appears clear that Sir Otto Jaffé is the "predecessor," that the sons are the "successors" and that there is a "succession" in respect of which duty is chargeable under section 10 of the Act.

The defendant, however, submits that he is protected from paying duty by the provisions of the latter part of section 12 of the Act; he relies on the following provision as being applicable to the case: "and no "person shall be chargeable with duty upon the "extinction or determination of any charge, estate "or interest created by himself" unless under circumstances which admittedly have no application here.

This gives rise to the question: who created the "charge, estate or interest" in favour of Dame Pauline Jaffé which was extinguished or determined by her death? If such charge, estate or interest has been created by Sir Otto Jaffé, defendant's point

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fails and he is liable to pay succession duty. Defendant submits that, as he and his brother covenanted to pay the annuity, but charged it on the lands, it was they and not Sir Otto who created the "charge, "estate or interest" in favour of Dame Pauline.

Defendant and his brother in said indenture of 18th June, 1912, charged the hereditaments and premises conveyed and assigned to them with the payment of the said annuity and every part thereof, and if I understand Mr. Jaffé's argument aright he did not contend that by this charge he and his brother made a "disposition" of the property in question. I am of opinion that this view is correct, and, further, that the only disposition made either of the property or of the annuity was made by Sir Otto. His sons covenanted with him that they would pay the annuity; this covenant was not an independent covenant made by them but was part of the consideration which induced Sir Otto to transfer the property to them, and he was, in my opinion, as much the settlor of the annuity as of the property transferred.

I come to the conclusion, therefore, that defendant's point under section 12 fails, and that he is liable to pay succession duty upon the determination of the annuity by the death of his mother.

Defendant's next point is: that the succession duty is not duly assessed, that the estate in respect of which it is assessed is worth less than £15,000, and that the case therefore comes within proviso (*a*) of section 58 (2) of The Finance (1909-10) Act, 1910, 10 Edwd. VII. c. 8.

The duty charged on the succession in this case is at the rate of one and a half per cent. made up as follows:

Duty at the rate of one per cent. is charged by section 10 of the Succession Duty Act, 1853, as the successor is the lineal issue of the predecessor.

By 51 Vict., c. 8, s. 21, an additional ten shillings per cent. duty is chargeable when the successor is the lineal issue of the predecessor.

Section 1 of The Finance Act, 1894, provided that these duties should not be levied in respect of property chargeable with estate duty.

Section 58 (2) of The Finance (1909-10) Act, 1910, provided *inter alia* that succession duty payable at the

rate of one per cent. on the amount or value of any succession under the Succession Duty Act, 1853, or any other Act, shall be levied and paid notwithstanding any repeal effected by or anything contained in the principal Act, i.e., The Finance Act, 1894, or any other Act . . . Provided that the duty shall not be levied (*a*) Where the principal value of the property passing on the death of the deceased in respect of which estate duty is payable (.....) does not exceed £15,000 whatever may be the value of the succession. The effect of this provision is that the exemption of lineals from the payment of succession duty in cases where estate duty has been paid is abolished in every such case except where the principal value of the estate does not exceed £15,000, and this exception can only be made available where estate duty is payable. Estate duty has not been demanded nor is it payable in the present case, so that no question arises as to whether the estate does not exceed £15,000.

Defendant's last point and that on which he has laid great stress is that he having duly served notice of his intention to appeal to His Majesty's High Court of Justice (in England), King's Bench Division, against the assessment in pursuance of the provisions of section 50 of The Succession Duty Act, 1853, the present information is not maintainable.

That section provides that it shall be lawful for any accountable party dissatisfied with the assessment of the Commissioners, upon giving within twenty-one days after the date of such assessment, notice in writing to the Commissioners of his intention to appeal against such assessment, and a statement of the grounds of such appeal, such statement to be furnished within the further period of thirty days, to appeal by petition accordingly to Her Majesty's Court of Exchequer in England, Scotland or Ireland, according to the place in which the appellant shall be resident, and there are provisions as to the hearing and determination of such appeals. Any such appeal would now go in England to His Majesty's King's Bench Division.

The assessments made upon the said Arthur Jaffé and his brother, William Jaffé, were dated the 29th

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day of June, 1932, and on the 18th day of July, 1932, being within twenty-one days of the date of such assessments, a notice of intention to appeal to the High Court of Justice in England, where they reside, was served by them upon the Ministry of Finance, Northern Ireland.

The grounds of the appeal were set forth in a document sent to the Ministry of Finance, dated the 16th day of November, 1932, long after the further period of thirty days had expired. The submissions made by the parties respectively on this branch of the case are as follow:—The Attorney-General contends that even if section 50 gives a right of appeal to the respondent, which he denies, such right does not prevent the Crown from proceeding by way of information for recovery of the duty; he says that the respondent has not fulfilled the conditions upon which alone an appeal would be open to him, those conditions being the giving of notice to the Commissioners, within twenty-one days after the date of the assessment, of an intention to appeal and the furnishing a statement of the grounds of appeal within a further period of thirty days, and the presentation of an appeal to the King's Bench Division in London. Of the three conditions just mentioned, only the first has been complied with. The Attorney-General further says that section 50 is not applicable where, as in this case, the liability to pay duty is disputed, that it can only be called in aid where there is a question as to the value of the succession or the amount of the assessment but not where there is a denial of liability. He further says that if this were a case where before the Government of Ireland Act, 1920, it had been open to the respondent to appeal to the King's Bench Division in London, such right of appeal has been impliedly taken away by that Act, and the powers of taxation given under it and by the setting up of a separate Exchequer for Northern Ireland.

The respondent, on the other hand, contends that by the service of the notice of intention to appeal under section 50, within the time prescribed by that section, even though the statement of the grounds of

appeal was not furnished within the further period of thirty days mentioned in the section, and even though up to the present moment no appeal in fact has been lodged in London, the Crown is precluded from proceeding by information for the recovery of the duties alleged to be payable.

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I think it unnecessary to offer any opinion on the various points raised on one side or the other further than to say that the only proceeding pending at present is the appeal to this Court, that if the respondent ever had a right of appeal under section 50 of The Succession Duty Act, 1853, he has omitted to take steps essential for the presentation or prosecution of that appeal, and that this case should be decided on the basis that no valid attempt to proceed with the appeal in question has been made by the respondent, assuming that such an appeal is open to him.

Mr. Jaffé argues that as no time is mentioned in section 50 within which the appeal is to be presented, it may be preferred at any time, which means that by declining to go on with the appeal he can prevent the Attorney-General from ever getting a decision on the point at issue. He also says that no time being mentioned, he is at liberty to present his appeal within a reasonable time, but in the absence of any facts showing that a reasonable time has not been exceeded in this case, I decline to hold that the respondent has brought himself within the provisions of section 50 of the Act.

I have, accordingly, arrived at the conclusion that the Attorney-General is entitled to have judgment for the amount claimed with costs of the information and of the argument in this Court.

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MEGAW, J.: The facts concerned with the appeal have already been fully stated, and I do not propose to restate them. The question which I propose to consider at the outset is, as to the competency of our Courts to deal with the case in view of the contention of the respondent, that by serving a notice of intention to appeal in England purporting to be given under section 50 of the Succession Duty Act, 1853, no

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proceedings to enforce the assessment made by the Ministry of Finance for Northern Ireland can be entertained by the Courts of Northern Ireland. Curiously enough, the section in question does not seem to have been the subject matter of much litigation though it has been on the Statute Book for such a lengthy period.

In the appeal before us, Mr. Jaffé, the respondent, has been assessed for succession duty relating to landed property in Northern Ireland by the Ministry of Finance for Northern Ireland, and, being resident in England, he has served the notice which he contends debars the Crown in our Courts from succeeding in any steps to recover a tax which is now payable into the Exchequer of Northern Ireland. The Attorney-General for Northern Ireland joins issue on this contention, and argues that so far as any right of appeal was given to English Courts on a Northern Ireland assessment prior to 1921, it is repealed by implication by the Government of Ireland Act, 1920. Great importance has been attached to this preliminary point, and its consideration involves not only a special scrutiny of the legislative changes effected by that Act as regards taxation but also a general survey of the constitutional change resulting from its enactment.

During the argument references were made to the relationship of the United Kingdom to the Dominions, which certainly deserve attention. But it is to be observed that, while undoubtedly many analogies exist between the Government of Ireland Act, 1920, as affecting Northern Ireland, and the Acts creating the Constitution of such Dominions as South Africa and Australia, there are some vital distinctions which must not be lost sight of when examining any arguments based on the law relating to Dominions. The Dominions had never Parliamentary representatives in the Parliament of the United Kingdom, and no Taxing Acts of the United Kingdom have for many years been applicable to them. Their revenues now vest in their respective Governor Generals. Ireland, until the Act of 1920 came into force, formed an

integral part of the United Kingdom, and though there were minor differences in taxation matters between Ireland and England, and different judicial forums before which taxing disputes might be brought, it was one legislative body, the Parliament of the United Kingdom, which granted taxes to His Majesty and by legislative enactments determined the methods applicable to their imposition and collection.

The tax with which we are concerned fell under the management of the Commissioners of Inland Revenue, a body which had control in all parts of the United Kingdom. At the date of the 1920 Act, there was one Exchequer and one Consolidated Fund in the United Kingdom. Procedure in regard to enforcing payment differed in some respects, and in some cases the Courts of the three Kingdoms had over-lapping jurisdictions.

As regards Northern Ireland, while great changes have been brought about by the Act of 1920, and important delegated powers have been given, there is still an important residuum of governmental powers and duties left to the Government of the United Kingdom including considerable powers of taxation. Northern Ireland holds a unique position in relation to the United Kingdom. It still forms part of it. It furnishes a very striking example of the position created by the grant of subordinate legislative and administrative powers—a constitutional relationship so admirably treated by Dicey in his *Constitutional Law*, but there is no exact parallel for the constitutional relationship between the United Kingdom and Northern Ireland. For all purposes Northern Ireland has part in the legislative functions of the United Kingdom. For some it exercises separate jurisdiction, through delegated powers which take their origin from the Government of Ireland Act, 1920, as modified by the Irish Free State (Consequential Provisions) Act, 1922.

In all matters connected with transferred or delegated powers we must needs look very closely as to what has actually been transferred not only in its substantive but also in its administrative aspect. There can be little ambiguity as to some transferred functions, but as regards others very considerable doubts may exist.

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Such doubts are by no means lessened by the fact that the system intended to be established by the Constituent Act of 1920 has largely been abandoned, and so much of it entirely altered as regards the other part of Ireland by the Irish Free State Constitution Act, 1922, and the Irish Free State (Consequential Provisions) Act, 1922. Adaptation Orders, which, were for the most part, made before the last-named Acts were enacted, have, by reason of these subsequent Acts and doubts as to whether in some cases their provisions may have been *ultra vires*, often increased instead of solving difficulties, but on the other hand, failure to make adaptations of law and procedure in the new situation has given rise to some troublesome situations. There are unbridged gaps in the transfer of functions which, but for remarkable goodwill between the parties interested might have produced unpleasant results. As an illustration of this I may refer to one situation which gives me constant anxiety. It is the strange anomaly in regard to the funds under—or supposed to be under—the control of our Courts, funds as to which I have to make orders almost every day I sit. These funds are lodged in a Bank which at the date of the Adaptation Orders was domiciled in the United Kingdom and adaptation orders were made on that basis. Since then the situation is entirely changed and the Head Office of that Bank is now for all practical purposes in a foreign state, over which, so far as I see, the Courts of Northern Ireland and the English Courts have no greater jurisdiction than they would have over any foreign commercial company carrying on business here.

In regard to taxation matters, special difficulty arises by reason of some of the previously existing taxes being transferred by the 1920 Act to Northern Ireland and others being retained by the Government of the United Kingdom, while their collection is made by the same officials.

Approaching the Government of Ireland Act, 1920, so far as it relates to the present case, we find that section 21 gives to the Parliament of Northern Ireland powers to legislate with respect to imposing, charging, levying

and collecting taxes other than certain specified taxes, and directs that the proceeds of such taxes shall be paid into the Consolidated Fund of Northern Ireland which was created by section 20 of the Act. Succession duty is included in the taxes over which the Parliament of Northern Ireland has such legislative powers, and it therefore falls into the category of "transferred taxes."

I may here observe that the powers so given are, in my opinion, only available over the territorial part of the United Kingdom known as Northern Ireland, and do not enable the Parliament of Northern Ireland to impose duties on English or Scottish administrative bodies or courts as regards such transferred taxes.

I may next refer to section 61, on which the respondent strongly relies. It reads as follows: "All existing "laws, institutions and authorities in Ireland, whether "judicial, administrative or ministerial, and all ex- "isting taxes in Ireland, shall, except as otherwise "provided by this Act, continue as if this Act had not "passed, but with the modifications necessary for "adapting them to this Act, and subject, as respects "matters within the powers of the Parliaments of "Southern Ireland and Northern Ireland, . . . to "repeal, abolition, alteration, and adaptation in the "manner and to the extent authorised by this Act."

Section 69 is a section of very considerable importance in many matters relating to Irish administration. Happily it is not necessary to consider this section except so far as it is concerned with the particular case before us. It gives very wide powers of subordinate legislation. Among these it gives His Majesty in Council power to make by sub-section—

(*a*) adaptations of existing acts to give effect to the new constitutional position created by the Act;

and by sub-section—

(*f*) to make provision with respect to the transfer of the right to recover any taxes charged but not paid before the appointed day and for apportionment of transferred taxes between the Exchequers dependent on the appointed day.

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I may notice here that the Orders in Council to be made under sub-section (*f*) are only to apply to "transferred taxes" so far as they require apportionment so that the Imperial Exchequer will receive the amount of the tax appropriate to the period before the appointed day. The Legislature here, in my opinion, shows conclusively that the power of the Parliament of the United Kingdom in regard to transferred taxes has ceased at the appointed day, and that such power has at the same time been absolutely and unequivocally vested in the Northern Ireland Parliament after the appointed day.

It is of some importance to investigate the method by which the transfer of taxing powers was effected. Under section 8 of the Government of Ireland Act, 1920, as appears on pages 1 and 2 of Volume I of the Belfast Gazette, the Lord Lieutenant directed that the Ministry of Finance for Northern Ireland should administer the financial business of the Government of Northern Ireland in matters that corresponded to the functions discharged by the Treasury of the Government of the United Kingdom, and also the business of Northern Ireland in connection with taxation, and should discharge functions in relation to taxes which the Parliament of Northern Ireland had power to impose corresponding generally to the functions discharged by the Commissioners of Customs and Excise and the Commissioners of Inland Revenue in relation to taxes imposed by the Parliament of the United Kingdom. This provision was made before the appointed day and it constituted an administrative body which on the "appointed day" would be in readiness to take over the transferred functions. When the appointed day came, unless something transpired in the meantime to modify this direction, the Ministry of Finance for Northern Ireland was to have the control that previously had existed in the Commissioners of Inland Revenue as regards transferred taxes. This latter body would still remain the constituted authority to deal with United Kingdom taxation but the Ministry of Finance for Northern Ireland would administer Northern Ireland transferred taxation.

As regards the Lord Lieutenant's direction, no modification of its provisions was made in reference to taxation functions before "the appointed day," which was afterwards fixed for taxation matters as 22nd November, 1921.

The next step in carrying out the transfer that calls for consideration which is specially pertinent to the question at issue is the Government of Ireland (Adaptation of Taxation Acts) Order, 1922 (Statutory Rules and Orders 1922, No. 80) made under section 69 of the Act. Clause 3 of this Order, recognising the Ministry of Finance as the new authority, provided that where steps in regard to transferred taxes had been taken by the Commissioners of Inland Revenue in connection with the charging, levying or collecting of any transferred taxes in Northern Ireland, all further steps necessary should be taken under the direction of the Minister of Finance. Clause 11 is perhaps the most important. It reads as follows: "In any enactment "references to the Commissioners of Inland Revenue ". . . . shall be construed as references to the Minister "of Finance for Northern Ireland." Clause 12 makes special reference to Acts included in the Order, of which the Succession Duty Act, 1853, is one. Clause 13 makes elaborate provisions as to apportionment of the taxes, by whomsoever collected, as between the United Kingdom and Northern Ireland, based on the transfer at the appointed day. Clause 14 makes special reference to the death duties that are leviable in Northern Ireland after the appointed day, and declares that in the Death Duties Act in their application to Northern Ireland, references to the Chief Office of the Commissioners of Inland Revenue shall be construed as referring to the Chief Office of the Ministry of Finance in Northern Ireland.

It is to be observed that there is no attempt in the Order to make any express modification of the provisions of section 50 of the Succession Duty Act, nor do I see how any modification of that section could have been made to meet a case like the present. The Order follows closely the directions given by section 69 (*f*) and (*g*) of the Government of Ireland Act, 1920.

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So far as I can see, the Northern Ireland Parliament has not enacted any legislative provisions in regard to the collection of succession duty. It has legislated in regard to accounts in the Consolidated Fund by chapter 2 of 12 Geo. V. (Northern Ireland), and as to succession duty by the Finance Act (Northern Ireland), 1923, section 6, but these enactments make no modification as regards the question in dispute and I do not see that either the Irish Free State Constitution Act, 1922, or the Irish Free State (Consequential Provisions) Act, 1922, has any bearing on the question.

I am now face to face with the issue to which the Attorney-General and respondent chiefly directed their arguments :—Whether section 50 of the Succession Duty Act, 1853, was impliedly repealed by the Government of Ireland Act, 1920, and the transfer of the tax, in so far as that section gave any power to or created any duty in the English Courts to decide matters connected with a tax whose control was under a Northern Ireland legislature ? Now I do not think that section 61 of the Government of Ireland Act, 1920, precludes repeal by implication.

In considering whether a statutory enactment is repealed by implication either in public or private Acts of Parliament, there must be clear and convincing evidence from the manifest purport of the new legislation that there is such incongruity or inconsistency between the new and the old that a Court is driven to the conclusion that it was intended by the Legislature to repeal the old, and I do not think that section 61 of the Government of Ireland Act precludes repeal by implication.

I have already referred to the legislative provisions which have a bearing on this and I may sum up the legal conclusions that seem to result. All the enactments recognise the absolute control of the newly established Government over the tax. From and after the appointed day the Commissioners of Inland Revenue cease to have anything to do with it. The Minister of Finance for Northern Ireland replaces them. That the tax has been transferred is indisputable.

That the Parliament of Northern Ireland has power to legislate as regards the imposition and collection of the tax is equally indisputable. The Commissioners of Inland Revenue continue their functions and retain their powers as regards the revenue of the United Kingdom but assessment of succession duty in Northern Ireland no longer comes under their control, so that, even according to the literal wording of section 50, the appeal contemplated by that section could not arise, and new legislative powers would have to be created to keep it operative.

The argument of the respondent in the present case implies that section 50 of the Succession Duty Act should now for practical purposes read somewhat as follows: "It shall be lawful for any accountable "party dissatisfied with the assessment of the Minister "of Finance for Northern Ireland, &c., upon giving "notice in writing to the Minister of Finance for "Northern Ireland."

On the whole, I am of opinion that such a reading cannot be accepted as a procedure compatible with giving a right of appeal to an English or Scotch Court against the assessment of the Minister of Finance for Northern Ireland over a Northern Ireland tax, which is not administered by a body over which they have any territorial jurisdiction. The notice in writing to be given under the section was to be given to a body who had jurisdiction in England and Ireland, viz., the Commissioners. The Minister of Finance has no such jurisdiction. The section in question, as I have already pointed out, governs procedure ancillary to the tax. The procedure sanctioned by the section in the state of affairs existing prior to the enactment of the Government of Ireland Act, 1920, is entirely inconsistent with the situation created by that Act. The existence of such a procedure would mean that the Minister of Finance for Northern Ireland, having control of a tax leviable by the Parliament of Northern Ireland in respect of land situate in Northern Ireland, would be subject to the jurisdiction of an outside tribunal in respect of that tax. Even in certain circumstances the English and Scotch County Courts would exercise

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jurisdiction over the Minister of Finance for Northern Ireland. This seems to me to be repugnant to any reasonable conception of the transferred power of taxation. The procedure contemplated by the Act was one where notice was given to the Commissioners who had an interest in the tax, and had duties to discharge in the area where the appeal would be heard. The assessment at present in force is not an assessment of the Commissioners of Inland Revenue who have no longer any interest in its collection or duty to discharge in reference thereto, and while the functions and duties of the Commissioners in regard to the tax have been transferred to the Minister of Finance for Northern Ireland who has no *locus standi* in England, the system of appeal created by the section is in my opinion inapplicable so far as it would give an appeal to the English Court and cannot now exist.

It is hardly to be expected that precedents should be found to such legislation as is contained in the Government of Ireland Act, and cases of implied repeal in the domestic legislation of the Parliament of the United Kingdom must necessarily be of incomplete analogy and I do not think that Courts should strain language that was apt enough in previous circumstances so as to make it fit into a new system created by legislation where this would defeat the tenor of such legislation.

Could it be argued that the section still would be operative in a converse case, say, as affecting the Irish Free State, and that a party assessed with the tax in England for English property, being resident in the Irish Free State, could resort to the Irish Free State Courts in an appeal against the assessment ?

Could our Northern Ireland Parliament, which now has full powers over the tax, so legislate as to compel the English courts to entertain such a jurisdiction as is asserted by the respondent to exist in them at present ? I have no doubt that if the Parliament of Northern Ireland attempted any such legislation, it would be held to be outside their powers.

I am clearly of opinion, therefore, that there is an implied repeal of section 50 so far as it gives any

appeal to the English Courts over Northern Ireland succession duty, and that the contention made by the respondent on this point fails.

If my view in regard to this is mistaken and it is possible for a resident in England to appeal under that section to the English Courts, it remains to consider whether the procedure the respondent has adopted is a bar to the present proceedings, and we must determine whether his contention that when a notice of appeal has been given under the section, the Court cannot entertain an information by the Crown to enforce the assessment either here or in England. Mr. Jaffé's argument as to this was very far-reaching, and I think, on the facts before us, he was bound to go to the length he did to maintain his defence. He contended that when he had given notice of appeal under section 50, whether he followed this notice up with a petition or not, the Crown could not successfully prosecute any action to enforce the assessment until the appeal was determined, and that on the true construction of the section the Crown was impotent to take any steps to bring the matter to an issue so long as he chose to hold his hand.

This contention, if accepted, would stultify the whole operation of the Succession Duty Act. It would equally affect the proceedings had they been instituted in our Courts on the basis of an assessment of the duty on the purchaser of the lands appearing to be charged with succession duty. The duty is a charge on the lands to which the purchaser is liable as well as Mr. Jaffé. The purchaser is resident in Northern Ireland, and, supposing he had served a similar notice here to that which Mr. Jaffé served in England, the position would be that the Crown could not either through its Attorney-General or Commissioners of Inland Revenue enforce payment of succession duty on him.

The respondent did qualify his courageous argument by suggesting the possibility of an alternative, viz., that a person resorting to the procedure of section 50 had a reasonable time in which to present his petition, and that in the circumstances any delay that had occurred was not unreasonable.

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If his broader contention were well founded, persons assessed with succession duty have been very remiss in attempting to escape it, and it is indeed remarkable that section 50 has been so little resorted to that it requires minute search to find cases under it in the Law Reports, but it seems to me that if the respondent had to depend on section 50 alone, its provisions do not entail any stay or bar to the Crown's proceedings by information. There certainly is no express enactment as regards a stay. Probably if a Court considered that a taxpayer had *bona-fide* brought himself within the terms of the section, it would stay proceedings till the necessary petition had been determined.

The effect and operation of section 50, however, must be carefully considered.

It commences "It shall be lawful for any *accountable* "party." Section 44 of the Act has defined who is an accountable party, and it appears from it that he is a party in whom property subject to the tax is vested. The provisions of section 50, therefore, are only available to persons who actually *are* liable to the tax, and nothing other than the amount of the assessment can be the subject matter of the notice authorised by that section. This is the view taken in *Hanson's Death Duties*, and, so far as I can see, the scant resort that has been made to this section has only comprised questions of value and no question of liability has been successfully sustained under it. Section 56 of the English Crown Suits Act, 28 & 29 Vic., c. 104, seems to recognise this as it discriminates between cases where there has been a notice of appeal against assessment under section 50 and cases where there has been disputed liability. The action of the Commissioners of Inland Revenue is there described by the side note as "summary proceedings for enforcing payment of "succession or legacy duty when assessed," and the section differentiates between two categories—

(1) "where there is no notice of appeal under section 50 of the Succession Duty Act" and

(2) "or of disputing the liability to assessment."

In the case before the Court, the notice of intention to appeal, dated 18th July, 1932, mentioned merely

"dissatisfaction with the assessments" but the particulars delivered on 16th November, 1932, impugned liability altogether, and, in my opinion, if valid in other respects, such a notice disputing all liability does not fall within the scope of the section.

Moreover, I am of opinion that section 50 never interfered with the right of the Attorney-General to proceed by information for payment of the assessed tax. Between 1853 and the Legacy Act of 1861 there was no express statutory enactment as regards the recovery of succession duty. During that period I should think that the procedure by information stood alone so far as affected the enforcement of assessed liability. The Legacy Duty Act of 1861 gave the Commissioners of Inland Revenue a right to sue under certain statutory conditions, but this did not conflict with the right of the Attorney-General, and only created an alternative procedure enabling the Commissioners themselves to proceed in as "summary a "manner that was considered to be properly described "proceedings." This is borne out by the references to the procedure for enforcing delivery of accounts, etc., as summary proceedings. The Queen's Remembrancer Act, section 15, still in force in Ireland, mentions how judgment may be given "in like manner "as a verdict *on information*." Consequently, even if I am mistaken in the conclusions I have arrived at as to the application of section 50, I am of opinion that the notice served on 18th July, 1932, cannot in the circumstances act as a bar to a Crown information. Indeed, as read in the light of the admissions made by Mr. Jaffé at the hearing, the notice of intention to appeal seems to me very like an abuse of the process of the Courts. Throughout the proceedings, which raised some points of great interest, he has deliberately refrained from taking any steps to prosecute the petition which he expressed his intention to institute a year and nine months ago, and at the hearing he has contended that he is still entitled to evade a determination of his liability to the Crown by continued inaction. His alternative argument, based on the right to proceed with the petition within a reasonable time, in my opinion is equally unsustainable.

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As regards liability on the merits, I do not think there can be any question. When the indenture of 18th June, 1912, is read as a whole it is quite clear that the charge created was created at the instance of the grantor, the deceased Sir Otto Jaffé, and is in reality consideration for the gift to the respondent and his brother, and I have no doubt that under the Succession Duty Act, 1853, Sir Otto Jaffé was the predecessor and the respondent and his brother the successors. It is equally clear that there is nothing in the acts cited which relieves the successors from liability.

I entirely agree with the judgments of the learned Lords Justices which have been given as regards the respondent's liability.

Solicitor for the Ministry of Finance: *J. H. B. Gunning.*

Solicitor for the Respondent: *J. Charley McDowell.*

J. R.

IN THE MATTER OF THE COMPANIES (CONSOLIDATION) ACT, 1908, AND IN THE MATTER OF WILSON & REID, LIMITED (1).

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Jan. 31. Feb. 1, 6.

Company—Policy of Assurance—Asset of Company—Overdraft from Bank—Estoppel—Deposit of Policy as collateral security—Legal assignment of policy to Bank by Directors as individuals to secure personal liabilities—Subsequent order for compulsory winding up—Whether Bank entitled to retain policy to meet Overdraft of Company—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69) *s.* 137.

On 12th January, 1905, Thomas Wilson and William Reid, who were then trading in partnership as Wilson and Reid, effected a policy of assurance on their joint lives, payable on the death of either of them, for £750 with profits. This formed part of the partnership assets. On 7th September, 1917, the partnership was formed into a limited company and on 18th October, 1917, the policy, among other things was transferred to the company and notice of the assignment duly served on the Assurance Society. Wilson and Reid Limited was a private company and its only shareholders were the said Thomas Wilson, the said William Reid, who were directors, Thomas Wilson being also the secretary of the company. In August, 1922, an overdraft for one year was sanctioned by the Ulster Bank on a loan guarantee of £10,000 by the company and this guarantee was secured by collateral securities of the private property of the said Thomas Wilson and William Reid. Included as collateral security was an item which was entered in the minute of the directors of the bank as "also jointly—Policy £750 in their joint names not assigned." The policy for £750 was held by the bank as a deposit and was entered in the books of the bank as an item of security under the heading Wilson & Reid, Ltd. "Held as it is without "assignment or notice to the company." The deposit was also entered as security for the said Thomas Wilson's personal account. At the time of making the deposit of the policy for £750 the bank had no knowledge that it had been assigned to Wilson and Reid, Limited. On 24th July, 1929, a legal assignment of the policy for £750 was made by Thomas Wilson and William Reid in their individual capacities to the bank not to secure the account of Wilson and Reid, Limited, but the accounts jointly, and severally of Thomas Wilson and William Reid. Notice of assignment was given by the bank to the Assurance Society. The bank received a letter informing it of the previous assignment of the policy for £750 to Wilson and Reid, Limited. Thomas Wilson died on 17th November, 1930,

(1) In the Chancery Division before Megaw, J.

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and on 5th December, 1930, Wilson and Reid, Limited, passed a resolution for voluntary winding-up; but an order for compulsory winding-up was subsequently made by the Court.

Held, by Megaw, J., that the bank received and held the policy for £750 as a guarantee by Thomas Wilson and William Reid personally and not as a deposit on behalf of the company under the powers given by the articles of association; and that the possession of the policy by the bank did not create any right against the company.

APPLICATION on behalf of the official liquidator of Wilson and Reid, Limited, for a declaration that the moneys paid to the Ulster Bank, Limited, on foot of a policy of assurance were the property of the company and for a consequential order that the monies so paid should be paid over to him.

The facts of the case are fully stated in the judgment of Megaw, J.

Hume, K.C., and *MacDermott* for the official liquidator:—

The transaction of 24th July, 1929, was a personal mortgage to secure personal advances and had no reference to the company. In *Vaughan v. Vanderstegen* (1), where a solicitor took a deposit of a policy from his client, under a parol agreement that it was to secure his then existing costs and afterwards made advances and took an assignment of the policy to secure them, the deed saying nothing about the costs, it was held, that the deed expressing no agreement that it was to include the costs, the possession under it merged the possession under the deposit and the policy was only a security for the advance. The deposit was only an agreement to create a legal mortgage and when that legal mortgage was subsequently created, it determined the rights and capacities of the parties. In all cases where an estoppel has been held against a company the company had made a deliberate assertion of fact. Here no such assertion has been made. A party cannot rely on an estoppel against another party in order to prevent that other party from denying a condition of facts which he himself never believed.

(1) 2 Drew 289, 61 E.R. 730.

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McGonigal, K.C., *Murphy, K.C.*, and *Chambers* for the Ulster Bank.

In the Matter of the Companies' (Consolidation) Act, 1908, and in the Matter of Wilson & Reid, Limited.

By the articles of association the directors of the company had power to raise or borrow money on behalf of the company and they must be presumed to have exercised such authority. [They referred to *The Royal British Bank v. Turquand* (1), *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co.* (2), and *Mahony v. East Holyford Mining Co.* (3).] The Court treats the deposit of title deeds as evidence of an agreement to create a legal mortgage. The deposit also creates a charge on the property represented by such title deeds. *Carter v. Wake* (4), *Pryce v. Bury* (5), *In re Owen* (6). The company is estopped from denying that the deposit of the policy was duly authorised. *Burkinshaw v. Nicolls* (7). [They also referred to *Bloomenthal v. Ford* (8), *In re MacDonald, Sons & Co.* (9), and *Robinson v. Brewery Co.* (10).]

Cur adv. vult.

Megaw, J.

Feb. 1, 6.

Megaw, J.: This is an application on the part of Mr. William H. Brandon, official liquidator of Wilson & Reid Limited, asking for a declaration that the moneys paid to the Ulster Bank Limited on foot of a policy of assurance are the property of the company, and for a consequential order that the monies so paid should be paid over to him. It came before me a week ago and was presented in a most able manner by Mr. Hume. Indeed it was argued with great ability on both sides and I confess that during the arguments my views on the question at issue suffered considerable fluctuations. The facts connected with the question to be determined are as follows:—

On 12th January, 1905, Thomas S. Wilson and William Reid, who were then trading in partnership as Wilson and Reid, effected a policy of assurance with the Scottish Equitable Life Assurance Society

(1) 6 E. & B. 327.
(2) [1895] 1 Ch. 629.
(3) L.R. 7 H.L. 869.
(4) 4 Ch.D. 605.
(5) 2 Drew 41 ; 61 E.R. 633.
(6) [1894] 3 Ch. 220.
(7) 3 A.C. 1004.
(8) [1897] A.C. 156.
(9) [1894] 1 Ch. 89.
(10) [1896] 2 Ch. 841.

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on their joint lives payable on the death of either of them for the sum of £750 with profits. This formed part of the partnership assets.

The partnership was formed or rather transformed into a limited company known as Wilson & Reid Limited on 7th September, 1917, and on 18th October, 1917, the policy, among other things, was transferred to the company and notice of the assignment duly served on the assurance society. Wilson & Reid Limited was a private company and I ascertained during the hearing that its only shareholders were Thomas S. Wilson, afterwards Sir Thomas Wilson, and Capt. William Reid, who were also its directors, Thomas S. Wilson being secretary, in addition.

It often occurs that when a partnership becomes a company, the partners seem to be imbued with the idea that while liability to creditors is limited to the capital of the company, for all practical purposes they can deal with the assets of the company as before incorporation. The management of Wilson & Reid, Ltd., furnishes another striking example of this commercial heresy.

In the conduct of the affairs of Wilson & Reid, Limited, confusion as to the management of the company seems not to have been confined to the company, but there are traces of such confusion on the part of the bankers of the company also—the Ulster Bank—and the difficulties in the present case are intensified, if not created, by failure to disentangle the capacities in which certain business transactions were effected.

The company, which in the first two years of its existence appeared prosperous, in 1922 required an overdraft, and in August, 1922, the directors of the Ulster Bank authorised this on the terms set out in the affidavit of Mr. F. F. Hyde, the secretary of the bank, who sets out in full the minute of the directors relating thereto. From this it appears that the overdraft for one year was sanctioned on a loan guarantee of £10,000 by Messrs. Wilson & Reid, and this guarantee was to be secured by collateral securities given for the most part by Wilson, all relating to his private absolute

property, and to a less extent by corresponding securities given by Reid. The minute concludes with an entry that is vitally concerned with the present case. It reads: "Also jointly—Policy £750 in their "joint names not assigned." Pausing here, I should gather from the entry if there were nothing further that this was a joint personal security to secure the loan guarantee account which had been given by the parties personally to secure the company's overdraft. It is also to be noticed that while policies on Wilson's life to the extent of £3,050 had been given by him as his part of the collateral security, these policies were properly assigned by written documents and notice thereof given to the companies.

The £750 policy thus given was held by the bank as a deposit and it was entered up in the books of the bank in the securities' book as one item of security under the heading Wilson & Reid *Ltd.* (though the exact date on which the word "Ltd." which was inserted in red ink, was so inserted did not satisfactorily appear during the hearing). Under this entry there appear the words: "Held as it is without assignment or notice to "company." The deposit was also entered up, apparently at the same time, as security for Wilson's personal account (which was then and for a considerable time afterwards in credit) "in accordance with the ordinary "banking practice" using Mr. Hyde's words. The other life policies of Wilson were treated in the same way to secure his personal account.

Admittedly at the time of the deposit of the policy for £750 the bank had no knowledge that it had been assigned to the company. It was deposited by Wilson himself on 12th August, 1922, and so far, at any rate, as the bank was concerned, there was then no suggestion that it was security given by or on behalf of the company. On the face of it the security was given by Wilson as collateral security for the loan guarantee account.

There is no record of any kind regarding the matter in the books or minutes of the company.

Matters remained in this state until 1929 when a legal assignment of the policy was made by Wilson

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and Reid in their individual capacities to the bank not to secure the account of Wilson & Reid, Limited, but the accounts jointly and severally of Messrs. Wilson & Reid. This was dated the 24th day of July, 1929, and was made on the mortgage form used by the Bank. It makes no reference to Wilson & Reid, Limited, but purports to be a continuing and collateral security for the payment of such sums not exceeding £1,100 as are or shall become owing by Sir T. S. Wilson and William Reid or either of them, and it contains a covenant by the assignors with the bank that they "now have full power to assign the said policy . . . "free from incumbrances." The bank then served notice of the assignment on the assurance society, and received a letter from that society, dated 26th July, 1929, informing them of the previous assignment of the policy to Wilson & Reid, Limited. This was the first intimation that the bank had of this assignment, but they appear to have taken no steps at that time to rectify any misconceptions or mistakes. The assignment, however, was entered in the securities book in the entry I have already referred to under the heading of Wilson & Reid, Limited.

This entry at the present begins as follows:— "Assignment dated 24th July, 1929 (stamped and "limited to cover £1,100) from Sir Thomas Wilson "and Captain William Reid to Bank of . "Deposited by Thomas S. Wilson at H.O. on 12th "August, 1922." At the foot of the entry there is a note giving the surrender value as £507 18*s.* 0*d.* on (11/4/28) and £603 4*s.* 0*d.* on 26th July, 1929.

Sir Thomas Wilson died on 17th November, 1930, and on 5th December, 1930, Wilson & Reid, Limited, passed a resolution for voluntary winding up; but by an order of this Court dated 19th January, 1931, it was ordered that the company should be compulsorily wound up, and Mr. Brandon was appointed official liquidator.

Some time after the death of Sir T. Wilson, the bank obtained payment of the policy moneys, £1,009 5*s.* 1*d.*, on giving an indemnity, but the official liquidator only became aware of this on receipt of a letter from the

bank, dated 21st March, 1931, in response to the statutory notice to creditors. This letter shows that certain properties had been mortgaged by the company itself to the bank, but the affidavit filed on behalf of the bank makes no mention of these. The letter of 21st March, however, mentions that the bank held "Assignment of Life Policy £750 and profits from Sir Thomas Wilson and Captain William Reid, the directors, on their joint lives payable to survivor. This policy has been collected and proceeds £1,009 5*s.* 1*d.* are held by us in suspense." What seems somewhat more remarkable is the statement that the claim of the bank had been admitted by the voluntary liquidator, considering that the company went into voluntary liquidation on 5th December, 1930, and the petition to wind up was filed on 23rd December. The admission of the bank's claim manifested wonderful activity on the part of the voluntary liquidator during his short term of office. Whether the payment of the moneys secured by the policy was made by the assurance company to the bank on the basis of this admission did not appear, but I see from the securities' book that the claim for payment was made on 17th December, 1930, while the voluntary liquidator was in control. It is not without interest in this connection to learn that the policy in the company's balance sheet made up to 1st September, 1929, stood as an asset valued at £1,245.

The official liquidator, however, on these facts claims that the proceeds of the policy are the property of the company, while the Ulster Bank allege that as under the articles of association of Wilson & Reid, Limited, its directors had power to raise or borrow money on behalf of the company, the deposit of the policy made by Wilson on 12th August, 1922, gave the bank a charge on the policy as against the company, and that accordingly they are entitled to retain the proceeds in part discharge of the overdraft of Wilson & Reid, Limited, which was indebted to them in a much greater sum.

In considering the question at issue, it is necessary to keep clearly before one's mind the distinction

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between Wilson and Reid in their individual capacities, and Wilson & Reid, Limited, the company, no doubt acting at times through its directors, Wilson and Reid. While the bank was aware of the distinction, I am not by any means convinced that in their dealings with the individuals and the company, they did not intentionally leave loopholes whereby they might take advantage of any ambiguous situation that might arise from the differing capacities of these customers of theirs. In any case, the entries in their books, which have been stated to be in accordance with the ordinary banking practice, tend to show that there has been no clear line consistently followed by the bank in regard to the lodgment of the deeds.

It is necessary in trying to solve the conflicting claims to bear in mind what is the effect in law of the deposit of deeds as a security. *In re Owen* (1), Stirling, J., says that the "Court treats the deposit as evidence "of an agreement to create a legal mortgage." Mr. McGonigal says that, in addition to this, a charge on the property represented by the deeds or documents is created. I accept this ; though I think it is involved in Stirling, J.'s statement. For the purposes of the present case the important matter is that at the heart of the transaction there must be an agreement express or implied, and a legal agreement requires that there should be definite parties to the transaction on the different sides. If A, one of the parties to an agreement, is under the impression that he is contracting with B and acts on that assumption, he cannot afterwards say "though I thought I was con- "tracting with B, I now find that my agreement was "with C." A contention of that kind, if accepted, would entail that there was no agreement at all, that there were never parties *ad idem* to the supposed agreement. No doubt there are cases where an undisclosed principal is bound by the act of his agent, but the circumstances where such liability occurs do not arise here. The affidavit of Mr. Hyde put in on behalf of the bank makes it clear that at the time of the deposit the bank understood that the deposit was made by Wilson on

(1) [1894] 3 Ch. 220, 227.

behalf of himself and Reid individually to secure the loan guarantee account, whereby these persons individually guaranteed the account of the company. In fact the transaction was not understood by anyone to be a guarantee of the company's account, but as collateral security for the guarantee given by Wilson and Reid as individuals to secure that account. In other words, it was to secure the performance by the guarantors of their contract with the bank. From the entries in the bank books, I entertain no doubt that till the 24th of July, 1929, the bank never for a moment understood that the deposit was made by or on behalf of Wilson & Reid, Limited. It would be establishing a dangerous principle if I were to decide that the bank, after having treated the transaction of 1922 for so many years as a security given by individuals, could in 1929 on their sole volition transform it into a security given by a person—the company is a person in law—with whom they had no notion they were dealing.

It was argued by the bank, however, that, though it was the case so far as the bank was concerned, that the deposit was made by Wilson & Reid individually, yet it was not the bank's conception of the transaction but Wilson's that should govern the matter, and it was argued that Wilson intended to bind the company by his action—that he had authority so to do, and that he must be presumed to have acted on such authority. So far as this is concerned, there is no record in the books of the company, which should certainly have been made in the case of such a dealing with the company's property, and we find that throughout the company's history the policy is entered on the balance sheet of the company as part of its unincumbered assets at an exaggerated value. If Wilson had intended to bind the company, one would certainly have expected some entry in the books, but, as I have said, even then there would have been no agreement such as would have created a charge, if Wilson intended one thing and the bank another.

Mr. McGonigal argued strenuously that in any event the company was estopped. I cannot see how the cases cited by him establish such a position. They

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were connected with representations made by the companies in all the cases. We have no evidence here of any such representations. So far as I can see, any representations that were made were made by these gentlemen in their personal capacity and not as directors of the company.

If the company had represented that the policy was the property of Wilson & Reid as individuals what right would they have over it, which would make it of any value when deposited. If they represented it as their own property, the bank did not act on this assumption.

If any real doubt existed in the matter it has been ended by the transaction of 24th July, 1929. There can be no doubt as to the meaning of the mortgage of that date which is set out in the securities' book of the bank. It is referred to in the letter of 21st March, 1931, as I cannot suppose that a mortgage by deposit can be indicated by the words: "We further held "assignment of life policy £750," which are part of the contents of that letter. Mr. McGonigal stoutly contended that this assignment was a mistake—a pure mistake, and should be treated as waste paper, just as he contended that the entry of the deposit as against personal account of Wilson was not binding on the bank, as it was an unauthorised entry by the manager of the head office of the bank. Mr. Hyde's affidavit, however, declares it to be in accordance with the ordinary banking practice. If the deposit were that of the company I should regard that practice as highly reprehensible. Could it be seriously contended that the bank, if it held the deposit on behalf of the company, had power apart from ordinary banking practice in derogation of the company's rights to use the security created by the deposit for the advantage of the bank in relation to their accounts with other customers? In my opinion, this entry made by an important official cannot be lightly brushed aside, it is evidence to be considered in forming an opinion as to the true situation, but I think that the assignment of 24th July, 1929, by way of legal mortgage, is practically conclusive.

The mortgage of the policy is clear and explicit. It was prepared by the bank. In it Wilson and Reid jointly as individuals are treated as owners of the policy. They so treat themselves and execute the mortgage as such, having no doubt been asked to do so by the bank to carry into legal effect the equitable agreement implied by the deposits. They covenant that they have a right to assign free from incumbrances. While I don't think that this legal mortgage creates an estoppel as against the bank, I regard it as very strong evidence and consistent with the other evidence that the bank received and must be treated as having held the policy deposited with them as a guarantee by Wilson and Reid personally and not as a deposit on behalf of the company under the powers given by the articles of the company.

The possession of the policy by the bank therefore did not create any right as against the company, and in my opinion, the proceeds now in possession of the bank are properly the property of the company, and the bank must account for them to the liquidator.

Solicitors for the official liquidator: *Wheeler & McCutcheon.*

Solicitors for the Ulster Bank: *S. S. & E. Reeves & Sons.*

J. R.

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Feb. 8, 13.
Mar. 29.

Judicial separation—Custody of child—Reference to Chief Clerk—Order affecting immediate custody of child—Jurisdiction—Matrimonial Causes Act, 1857 (20 & 21 *Vict.*, *c.* 85) *section* 35 *—Matrimonial Causes Act*, 1859 (22 & 23 *Vict.*, *c.* 61) *section* 4 *—Matrimonial Causes and Marriage Law* (*Ireland*) *Amendment Act*, 1870 (33 & 34 *Vict.*, *c.* 110)—*The Marriage Law* (*Ireland*) *Amendment Act*, 1871 (34 & 35 *Vict.*, *c.* 49)—*Guardianship of Infants Act*, 1886 (49 & 50 *Vict.*, *c.* 27), *sections* 5, 7, 11—*R.S.C. Order* 56, *r.* 17—*R.S.C. Order* 70, *r.* 57.

On the granting of a decree of judicial separation a stay was put upon the order to enable the parties to consider the question of the custody of the child of the marriage.

The petitioner later applied to the judge, who had heard the petition for judicial separation, for an order for the committal of the respondent for default in the payment of alimony *pendente lite* ordered to be paid by Megaw, J. No summons was taken out under section 5 of the Guardianship of Infants Act, 1886, nor was any application made by either party as to the custody of the child. The matter was adjourned generally for reference to the Chief Clerk. The Chief Clerk held an inquiry as directed and found (1) that the care and maintenance of the child be entrusted to the petitioner with such reasonable access by the respondent as the Lord Chief Justice should determine; and (2) that the respondent was able to comply with the order for the payment of alimony *pendente lite*. On 26th January, 1934, the Lord Chief Justice ordered that the custody of the child be transferred from the respondent to the petitioner and that the respondent pay to the petitioner alimony at the rate of £24 per annum.

Held, by the Court of Appeal that there is no jurisdiction in Northern Ireland in matrimonial proceedings to make orders affecting the immediate custody of children of the marriage either under section 7 of the Guardianship of Infants' Act, 1886, or otherwise.

Held also, that any declaration made under section 7 of the Guardianship of Infants' Act, 1886, with respect to the unfitness of a parent to have custody of the children of the marriage should be contained in the decree pronouncing the judicial separation.

(1) In the Court of Appeal before Andrews and Best, L.JJ.

APPEAL by the respondent from an order of Moore, L.C.J., dated 26th January, 1934, whereby it was ordered that the custody of Kathleen Elizabeth Carey, the child of the petitioner and respondent, should be given to the said petitioner and that the respondent should pay permanent alimony to the petitioner at the rate of £2 per month.

The facts of the case are fully set out in the judgment of Andrews, L.J.

Murphy, K.C., Lowry, K.C., and *Campbell* for the respondent :—

The Lord Chief Justice had no power to make an order for the immediate transfer of the custody of the child from the respondent to the petitioner. A judge in a matrimonial suit has no such jurisdiction. The order which could be made under section 7 of the Guardianship of Infants Act, 1886, in the nature of a declaration as to the unfitness for custody must by that section be made at the same time as the decree for judicial separation and cannot be made afterwards. *Webley v. Webley* (1), *Hitchings v. Hitchings* (2). And such order only comes into operation upon the death of the parent having the custody of the children. *Skinner v. Skinner* (3).

The jurisdiction of the Court in matrimonial causes is statutory and as such strictly limited in character. By section 35 of the Matrimonial Causes Act, 1857, and section 4 of the Matrimonial Causes Act, 1859, the Courts in England were enabled to make provision with respect to the custody and maintenance of children of the marriage up to and after the final decree. There are no sections in the Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870, as amended by the Marriage Law (Ireland) Amendment Act, 1871, from which the Courts in Ireland derived their jurisdiction corresponding to section 35 of the Act of 1857 or section 4 of the Act of 1859.

(1) 64 L.T.N.S. 839.
(2) 67 L.T.N.S. 530.
(3) 13 P.D. 90.

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There was no jurisdiction to refer the issues to the Chief Clerk. This is not one of the matters as prescribed by O. 56, r. 17, which may be referred by a Chancery judge to the Chief Clerk.

No order for permanent alimony can be made in the absence of an application for the same on notice of motion under O. 70, r. 57.

Beattie, K.C., *Porter, K.C.*, and *MacDermott* for the petitioner :—

No point as to the jurisdiction is taken in the Notice of Appeal. The respondent appeared by his solicitor before the Chief Clerk and no objection was taken to the Chief Clerk's findings. The authorities cited on behalf of the respondent relate only to the question of jurisdiction. These matters relate only to procedure and do not go to the jurisdiction. Irregularities of procedure may be, and were in fact, waived. Even if there is no statutory or other jurisdiction in the Court jurisdiction was conferred upon it by agreement between the parties. *The M. Moxham* (1).

It was competent for the Lord Chief Justice as a judge of the Chancery Division to make the order relating to the custody of, and access to, the child under section 5 of the Guardianship of Infants Act, 1886. *Cur adv. vult.*

ANDREWS, L.J.

Mar. 29.

ANDREWS, L.J. : The first question to be determined in this appeal is as to whether the Order of the learned Lord Chief Justice was made with, or in excess of, jurisdiction. The facts to which it is necessary to refer for the consideration of this question may be briefly stated. A petition for judicial separation, brought by the wife against her husband, which came on for hearing before the Lord Chief Justice on 16th October, 1933, resulted in a decree in the petitioner's favour on the charge of cruelty. The Lord Chief Justice, at the time of his making the decree, referred to section 7 of the Guardianship of Infants' Act, and Mr. Porter, on behalf of the petitioner, asked for a

(1) 1 P.D. 107.

certificate (*i.e.*, a declaration) that the respondent was a person unfit for the custody of the child. This the Lord Chief Justice refused to make, suggesting that Counsel should prepare a scheme for the custody of the child, and stating that, if necessary, he would be prepared to make an Order that the child should remain for six months of each year with either parent. He added that he would not make an Order then, but would give permission to apply again on notice, adding that it would be better if the judge who heard the case should be the judge to decide the question of the guardianship of the child. After Mr. Lowry, for the respondent, had pointed out that once the Order for judicial separation was made it would not be competent to deal with the other matter, namely, the custody of the child, the Lord Chief Justice granted the petition with costs, putting a stay on the Order until the second Friday in November to enable the parties to consider the question of the custody of the child.

On 7th November, 1933, a summons was served on behalf of the petitioner for an Order of committal against the respondent for default in payment of eleven monthly instalments of £2 10*s.* 0*d.* each, alimony *pendente lite* ordered to be paid by an Order of Megaw, J., dated 15th March, 1933. This summons came before the Court on 10th November. It was the only application properly before the Court on that day, as no notice in regard to the custody of the child had been served as directed by the Lord Chief Justice. Apparently, however, no point was taken as to the absence of such notice; and, after argument, the Lord Chief Justice ordered that the matter be adjourned generally for reference to the Chief Clerk to inquire:—(1) As to "the care and maintenance" of the child; and (2) As to the ability of the respondent to comply with the Order of 15th March, 1933. The Inquiry was duly held on 28th November, 1933, by the Chief Clerk who found:—(1) That the care and maintenance of the child should be entrusted to the petitioner, with such reasonable access by the respondent at such times as the Lord Chief Justice might determine; and (2) That the respondent was able to comply with the Order of

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15th March, 1933. The case was again listed before the Lord Chief Justice on 26th January, 1934, when, after the report of the Chief Clerk and other documents mentioned in the Order had been read, and the Lord Chief Justice had interviewed the child in his Chambers, he ordered the respondent to pay to the petitioner alimony at the rate of £24 per annum by monthly instalments of £2 per month, the petitioner undertaking to apply this money for the joint benefit of herself and the child; and he further directed that nothing in the Order should affect the question of the arrears of alimony. The Lord Chief Justice further ordered that the custody of the child be transferred to her mother, the petitioner, whom he appointed her guardian, and that she, the child, should reside in the house of Mr. Thomas McAuley, of Dunmurry, who is a brother of the petitioner, the respondent to have access to the child as therein mentioned, a stay being put on the Order for the purpose of appeal. It is this Order which has now been challenged in our Court by a notice of motion which, after requesting that the Order be set aside, seeks an Order that the appellant (*i.e.*, the husband) should have the custody of the child with such reasonable access to the petitioner as to the Court should seem meet.

The respondent's submissions upon absence of jurisdiction and irregularity of procedure are as follows:—

(1) That the Lord Chief Justice had no jurisdiction in this matrimonial suit to make an Order for the immediate transfer of the custody of the child from the respondent to the petitioner.

(2) That any such Order as could have been made under section 7 of The Guardianship of Infants' Act, 1886, in the nature of a declaration as to unfitness for custody should by that section have been made at the same time as the decree for judicial separation, and could not be made afterwards.

(3) That there was no jurisdiction to refer the issues to the Chief Clerk.

(4) That no Order for permanent alimony should have been made in the absence of an application

for same duly made by notice of motion in accordance with the provisions of Order 70, rule 57.

In reply to these submissions Counsel for the petitioner contended that they relate only to matters of procedure, not to jurisdiction, and that they, accordingly, could be and were in fact waived. Reliance was also placed upon the judgment of James, L.J., in *The M. Moxham* (1), in support of the proposition that even if no statutory or other jurisdiction existed in the Court, it was conferred by agreement between the parties.

It is the respondent's first submission, which appears to me to be of greatest importance; and, after very careful consideration, I have come to the conclusion that the point is a good one. In the administration of matrimonial law our Courts derive jurisdiction from The Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870, as amended by The Marriage Law (Ireland) Amendment Act, 1871. Prior to the Act of 1870 all jurisdiction in matrimonial causes and matters was vested in and exercised by the Ecclesiastical Courts; but by section 7 of that Act it was provided that from 1st January, 1871, all jurisdiction then vested in or exercisable by any ecclesiastical court or person in Ireland in respect of divorces *a mensa et thoro* . . . should belong to and be vested in Her Majesty, and such jurisdiction should be exercised in the name of Her Majesty in a Court of Record to be called the Court of Matrimonial Causes and Matters. It was further provided by section 13 of the Act that in all suits and proceedings the said Court for Matrimonial Causes and Matters should proceed and act and give relief on principles and rules which, in the opinion of the said Court, should be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts of Ireland had theretofore acted and given relief.

Thus the jurisdiction of the Court in matrimonial causes is statutory, and, as such, limited in character.

It was not suggested in the arguments before us that the ecclesiastical courts, whose jurisdiction was

(1) 1 P.D. 107.

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thus transferred, had any power in matrimonial matters to determine questions affecting the custody of infants, and my researches since the hearing have failed to disclose the existence of any such jurisdiction. That no such jurisdiction exists is, I think, further made abundantly clear by the fact that in England, where the jurisdiction of the ecclesiastical courts was similarly transferred by section 6 of The Matrimonial Causes Act, 1857, (which is in almost identical terms with section 7 of the Irish Act), it was deemed necessary to insert a special section in the Act (section 35) empowering the Court from time to time before making its final decree or by its final decree to make such provision as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit. So strictly was the language of the section conferring this jurisdiction interpreted, that it was found necessary two years later by section 4 of the Act of 1859 to amend section 35 in order to enable the Court to deal with such matters in relation to the children of the marriage after final decree. Such provisions as these would have been wholly unnecessary if a jurisdiction to deal with these matters existed in the ecclesiastical courts, for such jurisdiction would have been transferred by section 6 of the Act of 1857. No sections corresponding to section 35 of the Act of 1857 or to section 4 of the Act of 1859 are to be found in our Irish statutes.

For these reasons I am clearly of opinion that in Ireland no jurisdiction exists in matrimonial proceedings to make Orders affecting the immediate custody of children of the marriage. Reference was made, however, before us, as it was before the learned Lord Chief Justice, to the provisions of section 7 of The Guardianship of Infants' Act, 1886, which enacts that :—" In any case where a decree for judicial " separation . . . shall be pronounced, the Court " pronouncing such decree may thereby declare the " parent, by reason of whose misconduct such decree " is made, to be a person unfit to have the custody of

"the children, if any, of the marriage; and in such "case, the parent so declared to be unfit, shall not "upon the death of the other parent be entitled as of "right to the custody or guardianship of such "children."

The construction of this section was apparently at first regarded as not wholly free from doubt and difficulty. This at least, however, was clear—that the Court's jurisdiction only extended to the making of a declaration, and that such declaration must be made in and by the decree for judicial separation. That such a declaration is something wholly different from an Order determining or transferring the immediate custody of a child is apparent from the report of *Skinner v. Skinner* (1). By a decree nisi, the President, Sir James Hannen, had made an Order giving the custody of the two children of the marriage to the petitioner (the wife). Subsequently an application was made on behalf of the petitioner for a declaration under section 7, and this was granted, the President saying:—"The operation of this Order of course does "not arise until after the petitioner's death." Jeune, J., also expressed his opinion as to the construction of the section, when giving judgment in *Webley v. Webley* (2). In that case the Court, in pronouncing a decree of judicial separation, gave the petitioner the custody of the children; and Counsel for the petitioner applied that the Court should append to the decree a declaration under section 7. The learned judge said that the effect of making a declaration under the section was to shift the onus of proof, should any question *thereafter* arise as to the custody of the children. It enables the Court to interfere with the father's common law right to the custody of his children. Under the section he is not entitled to such "as of right." Therefore, if and when the question does arise, the burden is thrown upon him of showing that he has so altered his mode of conduct from what it has been before the declaration is made, as to have become a fit and proper person to be intrusted with the care of his children. This view

(1) 13 P.D. 90. (2) 64 L.T.N.S. 839.

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was adopted by Barnes, J., in *Hitchings v. Hitchings* (1), when he said that such a declaration merely destroyed the father's *prima facie* right to have the custody of the child, after the death of the petitioner. In *Woolnoth v. Woolnoth* (2), Jeune, J., gave actual custody of the children to the wife, but did not consider that the facts were sufficiently grave to warrant him in making a declaration under section 7, which would have the effect of prejudging the husband's future character. Likewise, in *Bagnall v. Bagnall and Hobbs* (3), Evans, J., pronounced a decree against the wife, and gave the husband, the petitioner, the custody of two children ; but he refused the declaration under section 7 on the ground that the circumstances were not sufficiently aggravated, stating that whilst the Order in one sense did not take effect against a respondent until after a petitioner's death, in another sense it inflicted a stigma upon a person.

This consistent line of authority leaves me no alternative but to hold that section 7 of the Act of 1886 does not confer jurisdiction to make an Order, such as was made in the present case, for the immediate transfer of the custody of a child of the marriage. Indeed, any such construction is further negatived by the fact that in England (to which, of course, the section also applies), any such provision would have been wholly unnecessary, owing to the provisions of the Acts of 1857 and 1859 to which I have already referred. What Parliament was obviously aiming at was something entirely different—the making of a declaration which would operate, not necessarily conclusively, but as a guide in future proceedings relating to the custody of children of the marriage.

Owing to the conclusions which I have expressed, it really becomes unnecessary to add any further opinion upon the section ; but, as the point was fully argued, I feel it right to say that, having regard to the wording of the section, and to the strict construction which was put upon section 35 of the Act of 1857 to which I have already referred, any such declaration

(1) 67 L.T.N.S. 530.
(2) 18 T.L.R. 453.
(3) 26 T.L.R. 659.

as is made under the section should, in my opinion, be contained in the decree pronouncing the judicial separation.

It is only fair to Mr. Beattie, who argued the case very clearly on behalf of the petitioner, to say that, pressed with the considerations to which I have referred, he ultimately admitted that there was no jurisdiction under section 7 of the Act of 1886 to make the Order under appeal; and his real argument in support of it was based upon the provisions of section 5 of The Guardianship of Infants' Act, 1886. That section empowers the Court, upon the application of the mother of any infant, to make such Order as it may think fit regarding the custody of such infant, regard being had to the matters mentioned in the section. Mr. Beattie could not deny that the Court in which such jurisdiction was vested by the section was a different Court from that exercising matrimonial jurisdiction, for section 9 defines "the Court" as meaning in Ireland "The High Court of Justice . . .", all applications in such High Court being made to the Chancery Division, in such manner as might be prescribed by rules of Court. Such rules providing that applications under the Act should be made by summons in a pending matter, or otherwise by originating summons in the matter of the infant, are to be found in Order 73 (Wylie 976-9), and the procedure in the Chancery Division is further prescribed by Order 55, rule 3 (9). In these circumstances Mr. Beattie contended that, as the Lord Chief Justice has power to exercise the jurisdiction of a judge of the Chancery Division, it was competent for him to make the Order which he did under section 5 of the Act of 1886, and that his doing so in the matrimonial matter, instead of upon a summons in a Chancery proceeding, was only an irregularity of procedure which could be waived, and which, on the facts of this case, must be taken to have been waived. I regret that I cannot accept this contention. The Order of the Lord Chief Justice, in relation to the custody of the child, was made in a matter and in a Court exercising a limited statutory jurisdiction which was not empowered to

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deal with this matter; and the Order cannot be validated by saying that it might have been made by the same judge, if a different procedure had been adopted, and if the learned judge who made it had been deputising, which he was not, for another judge in another Court. If the Order impugned were to be held to be validly made in this case it would, in my opinion, follow that such an Order might be made in every case in which the parties were willing that the jurisdiction should be exercised It is really immaterial that the point as to jurisdiction is not taken in the notice of appeal, and that on the contrary the husband asks in that notice that the custody of the child should be given to him, as it is the duty of the Court, if necessary, to raise a point which goes to the root of its jurisdiction. Consent cannot confer jurisdiction. The cases in support of this proposition will be found conveniently summarised in volume 9 *Halsbury's Laws of England*, page 13. The *M. Moxham* (1), on which Mr. Beattie relied, is no authority to the contrary. That was a special case of jurisdiction by contract, which, as I read the judgment of James, L.J., was distinguished from jurisdiction by consent; and I think Lord Esher's view as to all that was decided in that case was perfectly correct when he said that in it both parties were before the Court, and the only question was by what law the case was to be determined (See *British Wagon Co. v. Gray* (2)).

For these reasons I am of opinion that the Order in regard to the custody of the child cannot be supported; and, if we are pressed to do so, I am of opinion that it is a necessary consequence that the Order as to alimony must also be discharged, as in terms the amount of alimony was fixed on the basis of the child being handed over to the custody of her mother and the money being applied for the joint benefit of both. At the same time I would like to say that the amount fixed by the Lord Chief Justice appears to me to be so reasonable that I would suggest that the husband should, in his own interests, agree to accept it, and so avoid further costs of a motion in regard to such alimony.

(1) 1 P.D. 107. (2) [1896] 1 Q.B. 35, 37.

We shall give him until the first day of next sittings to notify his decision upon this point.

I only wish to add, that my opinion in regard to the Order as to permanent alimony is not dependent in any way upon the petitioner's failure to serve a notice of motion under the rules, as this was an irregularity of procedure only, which could be and was waived by the respondent.

The petitioner must abide her own costs of the Inquiry before the Chief Clerk, of the hearing and Order of 26th January, 1934, and of this appeal.

BEST, L.J.: This is an appeal by the respondent against the Order of the Lord Chief Justice dated the 26th day of January, 1934, whereby it was ordered that the custody of Kathleen Elizabeth Carey, the child of the petitioner and respondent, should be given to the said petitioner and that the respondent should pay permanent alimony to the petitioner at the rate of £2 per month and the appellant asks that the said Order be set aside and that in lieu thereof it may be ordered that the respondent should have the custody of the said Kathleen Elizabeth Carey with such reasonable access to her by the petitioner as to the Court should seem meet.

The suit was brought by the wife against her husband for divorce *a mensa et thoro* on the grounds of cruelty and adultery and there was a cross petition for divorce by the husband based on the alleged adultery of the wife. It was heard by the Lord Chief Justice sitting without a jury on the 16th day of October, 1933.

The respondent by his Counsel asked for and obtained leave to withdraw the allegation of adultery against the petitioner and the Lord Chief Justice found that adultery by the respondent was not proved but that the petitioner was entitled to a judicial separation with costs because of the cruelty of the husband. The Lord Chief Justice then mentioned that in any case where a decree for judicial separation has been pronounced the Court may, under section 7 of the Guardianship of Infants Act, 1886, declare either parent to be unfit to have the custody of the child.

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Mr. Porter thereupon asked for a certificate (I suppose he really meant a declaration) that the respondent is a person unfit to have the custody of the child. The Lord Chief Justice said he would not grant such a certificate at all as the whole evidence showed that the respondent was devoted to the child and that the parents were fighting over her. He suggested to Counsel on both sides that they should put their heads together and prepare a scheme for the custody of the child. He said if necessary he would be prepared to make an Order that the child should remain for six months of each year with either parent. He further said he would not make an order now but would give permission to either party to apply again on notice. Then a discussion took place as to the possibility of saving costs and his Lordship said he did not wish to interfere but he thought it would be better if the judge who heard the case should be the judge to decide the question of the guardianship (? custody) of the child.

Mr. Lowry then asked the Lord Chief Justice to grant a decree for judicial separation and to put a stay thereon until the second Friday in November to enable the parties to make application to his Lordship.

Mr. Porter then said, " Will your Lordship not make " the order for judicial separation to-day ? " Whereupon Mr. Lowry said, " Once your Lordship makes the " order for judicial separation you cannot deal with the " other matter in your Lordship's mind."

The Lord Chief Justice said, " I will grant the " petition with costs and will stay the order until the " second Friday in November to enable the parties " to consider the question of the custody of the child."

On the 7th day of November a summons was issued on behalf of the petitioner requiring the respondent to attend before the Judge at Chambers on Friday, the 10th day of November, 1933, on the hearing of an application on the part of the petitioner for an order of committal against the respondent for default made by him in the payment of eleven monthly instalments of £2 10*s*. 0*d*. each being eleven months' alimony from 1st January, 1933, to 1st November, 1933, directed to be paid by the respondent to the petitioner by

Order of Megaw, J., dated the 15th day of March, 1933, and for default made by the respondent in paying each of such instalments.

In support of this summons an affidavit was filed on behalf of the petitioner and against it one on behalf of the respondent and they were concerned solely with the ability or inability of the husband to pay the moneys directed to be paid by the said last mentioned Order.

No summons was taken out under section 5 of the Guardianship of Infants Act, 1886, nor was any application made by either husband or wife as to what should be done about the child although a stay had been put on the Order of the 16th day of October to enable them to consider the question of her custody.

In this state of affairs the Lord Chief Justice on the 10th day of November made an Order adjourning the matter generally for reference to the Chief Clerk to inquire : (1) as to the care and maintenance of the said Kathleen Elizabeth Carey, (2) as to the ability of the respondent William Edward Carey to comply with the Order made in the proceedings on the 15th day of March, 1933.

No objection appears to have been taken by counsel for either party to the making of this Order, and on the 28th day of November, 1933, the Chief Clerk held an inquiry as directed, and as a result found—

(1) That the care and maintenance of the child Kathleen Elizabeth Carey should be entrusted to the petitioner with such reasonable access by the respondent at such times as the Lord Chief Justice might determine.

(2) That the respondent is able to comply with the Order made in the proceedings on the 15th day of March, 1933.

The report of the Chief Clerk is dated the 20th day of December, 1933.

The evidence on which these findings were arrived at is not embodied in the Chief Clerk's report, nor is it available for examination by Counsel or by the members of this Court. Further, it appears from paragraph 5 of an affidavit sworn by the petitioner on the 6th

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day of February, 1934, and used by leave of the Court on the hearing of this appeal that, in addition to the report of the 20th day of December, 1933, already referred to, the Chief Clerk also reported at greater length to the Lord Chief Justice concerning what had transpired at the said inquiry and the conclusions he had arrived at. This further report was referred to, according to the same affidavit, by the Lord Chief Justice at the proceedings on the 26th day of January, 1934, the date on which the Order appealed from was made. It appears from paragraphs 9 and 10 of the same affidavit that two of the matters on which evidence was given at the Chief Clerk's inquiry were: (1) an allegation that the respondent made his daughter Kathleen sleep with him in the same bed after he had separated from petitioner and (2) an alleged admission by respondent that a brother of his who had been sent to a Borstal Institution for indecent assault upon a girl had stayed in respondent's house for a time. What effect these allegations may have had in influencing the Chief Clerk to report as he did does not appear, but it is significant that after the receipt of the Chief Clerk's reports the Order was made giving the custody of the child to the mother and allowing the father to take the child out only on every alternate Saturday from two to seven p.m., although the Lord Chief Justice had declared on 16th October at the close of the matrimonial proceedings that he was prepared to make an order that the child should remain for six months of the year with each parent.

The respondent in an affidavit sworn on the 12th day of February, 1934, in answer to that sworn by the petitioner on the 5th day of February, gave an explanation which satisfied me that the sleeping with his little daughter which is complained of took place when she was about nine years of age and while the parents were still living in the same house and was perfectly innocent. The same affidavit also explained that respondent's brother, who had been for a few months in a Borstal Institution, had made good during the War and his visit to respondent's house complained of by the petitioner and relied on as showing that the

house was not suitable for Kathleen Elizabeth to live in, took place in October, 1933, fifteen or sixteen years subsequent to the Borstal incidents.

I think it is highly to be deprecated that matters like those just mentioned should have been introduced at the Chief Clerk's inquiry. They were introduced for the purpose of affecting the Chief Clerk's mind adversely to the respondent and were, in the absence of explanation or denial, calculated to produce the impression that it would be dangerous to the morals of Kathleen Elizabeth to be in the custody of her father.

The Order appealed from, in addition to regulating the custody of the child, directed the payment of permanent alimony at the rate of £2 per month.

This Order is attacked on two main grounds :—

(1) That it is made without jurisdiction ; and

(2) That the whole weight of the evidence derived from the report of the matrimonial proceedings and from the various affidavits filed goes to show that removal from the father and his society, now enjoyed uninterruptedly for over two years, would be detrimental to the welfare and best interests of the child.

This second ground goes to the merits of the case and need only be dealt with if we come to the conclusion that there was jurisdiction to make an order at all.

I am unable to say under what authority the Lord Chief Justice purported to act when making the Order complained of. He clearly could not make it under section 7 of The Guardianship of Infants Act, 1886, for that section only enables the Court to make such a declaration as is therein referred to and to make it in the very decree by which the judicial separation is pronounced, and the Lord Chief Justice expressly declined to make such a declaration.

Mr. Beattie for the petitioner, while frankly admitting that he cannot tell under what jurisdiction the matter was referred to the Chief Clerk for report, submits that section 5 of The Guardianship of Infants

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Act, 1886, gives jurisdiction to the Lord Chief Justice to make the Order in question so far as regards the custody of the child and the right of access thereto. That section enables the Court, upon the application of the mother of any infant, to make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent having regard to the matters mentioned in the section.

Section 11 of the Act, however, provides that rules for regulating the practice and procedure in any proceedings under this Act, and the forms in such proceedings, may from time to time be made (*a*) so far as respects the High Court of Justice or Her Majesty's Court of Appeal in England or Ireland by Rules of Court. The rules under section 11 will be found in Order 73 of the Rules of the Supreme Court. I agree with Mr. Beattie that there would have been jurisdiction in the Lord Chief Justice to make the Order in question so far as regards the custody of the child if the matter had been brought regularly before him under section 5, but in the absence of authority deciding otherwise, I am unable to hold that because matrimonial proceedings have been taken and because no objection is raised by either party, jurisdiction is conferred upon the Court to act as if an application had been regularly and properly made by the mother under section 5 of the Act of 1886.

Again, where was the authority for making an order for the payment of permanent alimony ? That order can only be made pursuant to motion on notice expressly issued for the purpose : See Order 70, rule 57, of the Rules of the Supreme Court.

Like Mr. Beattie, I am quite unable to see by what authority the business of inquiring into this matter was referred to the Chief Clerk. The matters to be referred to him and his powers and duties are set out in Order 55, rule 17, and I know of no case in which questions as to the custody of children have been referred to him. If the application had been brought regularly under section 5, it is the Court, not the Court after a reference to the Chief Clerk, that is to make the Order.

I have, accordingly, arrived at the conclusion that there was no jurisdiction to make the Order appealed from, but as the Lord Chief Justice if not invited to make it, was certainly allowed to do so without protest, I think the proper order to make is to allow the appeal but without costs.

I agree also that the petitioner must abide her costs of the motion decided on 26th January, 1934, and the proceedings relating thereto.

Solicitor for the petitioner: *J. C. Taylor.*
Solicitor for the respondent: *Bernard Campbell.*

J. R.

K.B.D.
1934.

May 7, 11.

COMMISSIONERS OF INLAND REVENUE
IN RE SIR SAMUEL KELLY (1).

Income Tax—Interest payable on advance from Bank—Claim for repayment of tax by guarantor—Refusal of claim by Special Commissioners—Whether Appeal by way of re-hearing lay from decision of Special Commissioners to Recorder—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40) *sections* 36, 195, 196, 202—*Finance Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 36) *section* 19—*Right of Appeal.*

The respondent applied to the Commissioners of Inland Revenue under section 36 of the Income Tax Act, 1918, and section 19 of the Finance Act, 1925, for the repayment of income tax on interest which he claimed to have paid, without deduction of tax, out of profits brought into charge to tax by him as guarantor for an overdraft in the Bank, of certain business concerns.

The Commissioners refused the claim and the respondent appealed to the Special Commissioners who also refused the claim. The respondent required the Special Commissioners to list an appeal before the Recorder; this the Special Commissioners refused to do on the ground that the Recorder had no jurisdiction to hear the appeal.

The respondent then requested the Recorder to list the appeal and the Recorder provisionally listed it for argument on the preliminary question as to whether or not he had jurisdiction to hear it.

The Recorder held that he had jurisdiction.

The Commissioners then obtained a conditional order of prohibition, forbidding the Recorder to hear the appeal, and the case then came before the Court on motion to make the conditional order absolute.

Held, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that the words in section 19, sub-section (3) of the Finance Act of 1925, that "All provisions of the Income Tax Acts "relating to such an appeal" do not enable an appeal by re-hearing to be made to the Recorder or County Court Judge and that the conditional order must be made absolute.

MOTION to make absolute a conditional order of prohibition directed to the Recorder of Belfast forbidding him to hear an appeal for the repayment of income tax.

(1) In the King's Bench Division before Moore, L.C.J., and Brown, J.

Sir Samuel Kelly, who resides in County Down, and carries on business in Belfast and other places, made application to the Commissioners of Inland Revenue under the provisions of section 36 of the Income Tax Act, 1918, and section 19 of the Finance Act, 1925, for the repayment of income tax for the years ending 5th April, 1927, and 5th April, 1928, on the amount of interest which he claimed to have paid, without deduction of tax, out of profits and gains brought into charge to tax by him in Belfast as guarantor for an overdraft in the Ulster Bank Limited of certain business concerns having their registered offices in Belfast. The Commissioners of Inland Revenue refused such claim for repayment, and Sir Samuel Kelly, claiming to be aggrieved by this decision, made application to have his claim heard and determined by the Special Commissioners under the provisions of section 19 of the Finance Act, 1925. The Special Commissioners sitting in Belfast heard this claim and announced their refusal to allow the same, whereupon Sir Samuel Kelly declared his dissatisfaction with such refusal and required that his appeal should be re-heard before the Recorder of Belfast. The Commissioners of Inland Revenue contended that the Recorder had no jurisdiction to hear such appeal. Sir Samuel Kelly then required the Special Commissioners to list the appeal for hearing before the Recorder, and the Special Commissioners refused to do this.

By letter of the 4th July, 1933, Sir Samuel Kelly requested the Recorder to list his appeal and the Recorder provisionally listed it for argument on the preliminary question as to whether or not the appeal might be heard by him, and heard such argument on November, 2nd, 1933.

On the 13th February, 1934, the Recorder gave judgment declaring that he had jurisdiction to hear the appeal, and directed that it should be listed for hearing on a date to be agreed upon between the parties.

Following upon this judgment, the Commissioners of Inland Revenue applied that a conditional order of prohibition should be directed to the Recorder for-

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COMMISSIONERS OF INLAND REVENUE IN RE SIR SAMUEL KELLY.

bidding him to hear such appeal. Such conditional order was granted and the case came before the King's Bench Division on application by the Commissioners of Inland Revenue that the order might be made absolute.

The Attorney-General (*A. B. Babington, K.C.*), *J. C. Davison, K.C.*, and *J. Gerald Dougherty*, for the Commissioners of Inland Revenue:—

The repayment mentioned is quite different from an assessment. We submit that there is no appeal in respect of a repayment. Section 202 of the Income Tax Act, 1918, makes it quite clear that there is a distinction between exemption and repayment of tax. In cases of assessments an appeal by way of re-hearing lies to the Recorder, but claims for repayment of tax are made to and finally determined by the Special Commissioners.

It will be necessary for the Court to construe section 19 of the Finance Act, 1925. Section 19, sub-section 1 (*b*) provides that a claim for repayment shall be made to the Commissioners of Inland Revenue, and the Commissioners shall, on proof of the facts to their satisfaction, allow the claim accordingly.

Sub-section 2 provides that any person who is aggrieved by the decision of the Commissioners may make an application to have his claim for repayment heard and determined by the Special Commissioners.

Sub-section 3 provides that where any such application is made, the Special Commissioners shall hear and determine the claim in like manner as an appeal made to them against an assessment under Schedule D., and all the provisions of the Income Tax Acts relating to such an appeal (including the provisions relating to the statement of a case for the opinion of the High Court on a point of law) shall apply accordingly with any necessary modifications.

Section 195 of the Income Tax Act, 1918, provides that all appeals against assessments shall be heard and determined by the Special Commissioners, and their determination on any such appeal shall be final and

conclusive unless the person assessed requires that his appeal shall be heard as hereinafter provided, or unless under the provisions of this Act, a case is required to be stated for the opinion of the High Court.

Section 196 provides that any person who is aggrieved by the determination of the Special Commissioners in any appeal against an assessment made upon him may require that his appeal shall be reheard by the Recorder or County Court Judge having jurisdiction in the place where the assessment was made.

Sub-section 2 provides that the Recorder or County Court Judge shall re-hear and determine the appeal and his determination thereon shall be final and conclusive.

The question is, does sub-section (3) of section 19 of the Finance Act, 1925, incorporate section 196 of the Income Tax Act, 1918? The Recorder thought that it did because of the use of the words "with all "necessary modifications." We submit that sub-section (3) does not incorporate section 196. The latter section applies only to assessments and not to repayment claims. A right of appeal cannot be given by implication, it can only be given expressly. We submit that this sub-section applies only to procedure. "Such an appeal" means the appeal that the Commissioners were dealing with. The right of appeal under section 196 is not a provision of the Income Tax Acts relating to "such an appeal."

We submit that adopting the *expressio unius, exclusio alterius* canon of construction, the provisions of section 196 of the Income Tax Act, 1918, are not imported into the Finance Act, 1925.

Section 196 provides that the appeal shall be reheard by the Recorder or County Court Judge, as the case may be, having jurisdiction in the place where the assessment was made.

In the present case, the taxpayer resides in County Down. We submit that the claim for repayment was decided by the Commissioners in London. If the claim for repayment was not decided in London, it was decided in County Down where the taxpayer resides.

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It was certainly not decided in any place within the jurisdiction of the Recorder of Belfast. It has not been shown that this appeal has been brought in the proper place.

We submit that an unwarranted attempt is being made to extend sub-section 3 of section 19 of the Finance Act, 1925.

The words used in section 7, sub-section 6 of the Income Tax Act, 1918, which are "so far as they are "applicable" are much stronger than the words "with any necessary modifications" used in section 19, sub-section (3) of the Finance Act, 1925, and we adopt the *à fortiori* argument. In *Rex v. Joseph Hanson* (1), Abbot, C.J., said in his judgment "For "the rule of law is, that although a certiorari lies, "unless expressly taken away, yet an appeal does not "lie, unless expressly given by statute." In *Regina v. Stock* (2) it was held that an appeal cannot be given by implication only. In his judgment in that case Patteson, J., said "the dictum in *Rex v. Hanson* (1), "that a certiorari lies unless expressly taken away, "but an appeal does not lie unless expressly given, "seems to be clear law."

Williams, J., in his judgment in *Regina v. Stock* (2), said, "There are innumerable instances where an "appeal is given in terms; but no case has been "mentioned in which it has been given by impli-"cation."

We submit that in the present case no appeal was intended or given.

The Attorney-General v. Sillem (3) decided that "the "creation of a right of appeal is an act which requires "legislative authority. Neither the inferior nor the "superior tribunal, nor both combined, can create "such a right, it being essentially one of the limitation "and of the extension of jurisdiction."

The Finance Act, 1925, does not give a new right of appeal.

It is the Special Commissioners who are to hear and determine the claim. It is to be finally determined by them.

(1) 4 B. & Ald. 519, 521.
(2) 8 Ad. & E. 405, 412.
(3) 10 H.L.C. 704.

The Income Tax Acts distinguish between appeals and appeals by way of re-hearing.

Black, K.C., and *MacDermott* for Sir Samuel Kelly :—

The case really stands or falls on section 19 of the Finance Act, 1925. The Special Commissioners of Income Tax when hearing appeals against assessments are performing a strictly judicial function. The real object of section 19 was to put claims under section 36 of the Income Tax Act, 1918, in the same position as appeals against assessments In drafting sub-section (3) of the Finance Act, 1925, the draftsman was endeavouring to introduce the widest possible terms. The ambit of this sub-section includes proceedings before the Special Commissioners and beyond including the necessary consequences of the appeal.

Section 195 of the Income Tax Act, 1918, and section 19 of the Finance Act, 1925, should be read as one composite section. The result is that the decision of the Special Commissioners is only made final and conclusive if no appeal by way of re-hearing takes place before the Recorder. The words "all the "provisions" in sub-section (3) of section 19 of the Finance Act, 1925, must have a very wide ambit.

In *Gregg v. Richards* (1), Pollock, M.R., referring to the maxim "*expressio unius exclusio alterius*," said, "I think it would be far safer to regard this so-called "rule as not a rule of law, but a canon of construction "to be applied in appropriate cases." Strong dicta are quoted by Pollock, M.R., to the effect that this is a maxim or canon of construction to be regarded with considerable distrust.

The Attorney-General (in reply) :—

If ever there was a case in which the maxim "*expressio unius exclusio alterius*" should apply it is the present case. The intention was that England and Ireland should be on the same footing. The onus is upon the taxpayer to show that he has a right of appeal to the Recorder. As no assessment has been

(1) [1926] Ch. 521, 528.

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made in the present case, we submit there can be no jurisdiction in the Recorder.

No assessment was made notionally or otherwise within the jurisdiction of the Recorder.

Cur adv. vult.

SIR WILLIAM MOORE, L.C.J.

MOORE, L.C.J.: Mr. Justice Brown and I have considered this matter very carefully and we are both agreed. He will deliver the judgment of the Court.

May 11.

BROWN, J.

BROWN, J.: Sir Samuel Kelly, who resides in County Down and carries on business in Belfast and in other places, made application to the Commissioners of Inland Revenue under the provisions of section 36 of the Income Tax Act, 1918, and section 19 of the Finance Act, 1925, for the repayment of Income Tax for the years ending 5th April, 1927, and 5th April, 1928, on the amount of interest which he claimed to have paid, without deduction of tax, out of profits and gains brought into charge to tax by him in Belfast as guarantor for an overdraft in the Ulster Bank of certain businesses having their registered offices in Belfast. The Commissioners of Inland Revenue refused such claim for repayment, and Sir Samuel Kelly, claiming to be aggrieved by this decision, made application to have his claim heard and determined by the Special Commissioners under the provisions of section 19 of the Finance Act, 1925. The Special Commissioners sitting in Belfast heard this claim and announced their refusal to allow the same, whereupon Sir Samuel Kelly declared his dissatisfaction with such refusal and required that his appeal should be re-heard before the Recorder of Belfast. The Commissioners of Inland Revenue contended that the Recorder had no jurisdiction to hear such appeal. Sir Samuel Kelly then required the Special Commissioners to list the appeal for hearing before the Recorder and the Special Commissioners refused to do this for the reason already given.

By letter of the 4th July, 1933, Sir Samuel Kelly requested the Recorder to list his appeal and the Recorder provisionally listed it for argument on the

preliminary question as to whether or not the appeal might be heard by him, and heard such argument on the 2nd November, 1933.

Two matters were argued before the Recorder—

(1) Whether there was any appeal by way of rehearing from the decision of the Special Commissioners; and

(2) If such an appeal did lie, had the Recorder jurisdiction to hear it.

On the 13th February of this year the learned Recorder gave judgment declaring that he had jurisdiction to hear the appeal and directed that it should be listed for hearing on a date to be agreed upon between the parties. The Commissioners then applied that a conditional order of prohibition should be directed to the Recorder forbidding him to hear such appeal, and the case came before us on application by the Commissioners of Inland Revenue that such conditional order might be made absolute.

Section 36 of the Income Tax Act, 1918, deals with what we may call repayment of Income Tax, and the provisions of the Act of 1918 were extended by the Finance Act, 1925, section 19.

Before looking at any change which is made by section 19 of the Finance Act, 1925, it is well to see how matters stood under the Act of 1918.

Section 36 of the Income Tax Act, 1918, provides that where interest payable in the United Kingdom on an advance from a bank is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the Special Commissioners, to repayment of tax on the amount of the interest. Section 202 of the same Act provides that all claims for the repayment of tax under this Act shall be made to, and *finally* determined by, the Special Commissioners.

The effect of these sections is that under the Act of 1918 a claim for repayment was made to the Special Commissioners, was determined by the Special Commissioners, and there was no appeal from such determination.

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The Finance Act of 1925 makes some changes. Section 19, sub-section 1 (*b*), provides that a claim for repayment shall be made to the Commissioners of Inland Revenue, and the said Commissioners shall, on proof of the facts to their satisfaction, allow the claim accordingly.

Sub-section 2 provides that any person who is aggrieved by the decision of the said Commissioners may make an application to have his claim for repayment heard and determined by the Special Commissioners.

This was a new appeal, and sub-section 3 of the same section provides :—

"Where any such application as aforesaid is "made, the Special Commissioners shall hear "and determine the claim in like manner as "an appeal made to them against an assess- "ment under Schedule D., and all the pro- "provisions of the Income Tax Acts relating to such "an appeal (including the provisions relating to the "statement of a case for the opinion of the High "Court on a point of law) shall apply accordingly "with any necessary modifications."

This sub-section deals in its first clause with procedure and provides that this new appeal shall be heard and determined *in like manner* as an appeal against assessment under Schedule D. It is the second clause providing that "all the provisions of the "Income Tax Acts relating to such an appeal shall "apply accordingly," which is the subject of controversy in this case.

With most of the provisions applicable to appeals made against assessments we are not concerned ; but in Part IX of the Income Tax Act, 1918, which contains "Special Provisions applicable to Ireland," are to be found two sections, 195 and 196, which, it is contended, are incorporated in sub-section 3 of section 19 of the Finance Act of 1925.

Section 195 provides that "all appeals against "assessments shall be heard and determined by the "Special Commissioners, and their determination on "any such appeal shall be final and conclusive unless

"the person assessed requires that his appeal shall be "re-heard as hereinafter provided, or unless, under the "provisions of this Act, a case is required to be stated "for the opinion of the High Court."

Section 196 provides that any person who is aggrieved by the determination of the Special Commissioners in any appeal against an assessment made upon him may require that his appeal shall be re-heard by the Recorder or County Court Judge having jurisdiction in the place where the assessment was made. Sub-section 2 provides that the Recorder or County Court Judge shall re-hear and determine the appeal and his determination thereon shall be final and conclusive.

From these two sections of the Act of 1918 it is seen that a person aggrieved by the decision of the Special Commissioners in an appeal on an assessment made against him has two courses open to him—

(*a*) he may require the Special Commissioners to state a case for the opinion of the High Court ; or

(*b*) he may appeal from the decision of the Special Commissioners to the Recorder or County Court Judge.

It is contended by counsel for Sir Samuel Kelly that both these courses are open to a person aggrieved under section 19 of the Finance Act of 1925.

It is clear that what is called the appeal by case stated is open to him, for it is expressly mentioned in sub-section 3 of that section. A case is stated by the Special Commissioners for the opinion of the High Court upon a point of law. When the High Court has determined the point of law, the case goes back to the Special Commissioners, and, with the assistance of the decision of the High Court, the Commissioners decide the case. It has never been taken from them. Their decision under section 202 of the Act of 1918 is final.

In (*b*) the appeal by way of re-hearing is an appeal from the decision of the Special Commissioners to the Recorder or County Court Judge. The case leaves the Special Commissioners and goes to a new tribunal. The new tribunal may affirm or reverse or vary in any way any order which the Special Commissioners may have made. The case does not go back to them.

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It is contended by the Attorney-General on behalf of the Commissioners of Inland Revenue that this provision (*b*) is not incorporated in sub-section (3) of section 19 of the Finance Act, 1925.

The words of the sub-section are: "All provisions "of the Income Tax Acts relating to such an appeal," *i.e.*, relating to an appeal made *to* the Special Commissioners against an assessment under Schedule D.

We are of opinion that these words do not include an appeal by re-hearing to the Recorder or County Court Judge. An appeal by re-hearing is an appeal *from* the Special Commissioners to a different tribunal.

Section 202 of the Act of 1918 has not been repealed. In that section appeals by way of re-hearing are expressly given to exemptions. In section 19 of the Act of 1925 appeals by cases stated are expressly mentioned, but there is no express reference to appeals by way of re-hearing. Appeals for repayment are still left to the final determination of the Special Commissioners with the assistance, where required, of the High Court on a point of law.

As we are of opinion that there is no appeal by way of re-hearing, it is not necessary for us to decide the second point argued in the case whether, if an appeal did lie, it was the Recorder of Belfast or the County Court Judge of Down or of some other county who had jurisdiction to hear the appeal.

We therefore have come to the conclusion that the conditional order must be made absolute with costs.

Solicitor for the Commissioners of Inland Revenue; *The Solicitor of Inland Revenue.*

Solicitors for Sir Samuel Kelly: *McKinty & Wright.*

J. McC.

SUMNER v. SUMNER (1).

C.A. 1934.

Oct. 15, 22.

Practice—Discovery—Documents—Action by former wife against former husband whom she had divorced—Agreement for settlement—Collusion—Particeps criminis.

In an action for the recovery of the costs of the preparation of a deed of settlement made pursuant to an agreement between the defendant and the plaintiff.

The defendant pleaded *inter alia* that the agreement was entered into in pursuance of a collusive bargain made between the plaintiff and the defendant, whereby the defendant agreed to assist the plaintiff in obtaining a divorce by supplying evidence of misconduct to the plaintiff on which proceedings might be maintained, and that he, the defendant, did supply such evidence and assisted the plaintiff to obtain a divorce.

The defendant applied by motion for discovery of all documents touching the matters at issue.

The Lord Chief Justice refused the motion on the ground that he would not allow the Court to assist the defendant in establishing his own fraud.

The defendant appealed to the Court of Appeal.

Held, by the Court of Appeal (Andrews and Best, L.JJ.), that the Lord Chief Justice's discretion was not in any way fettered and was properly exercised, and that his decision should be affirmed.

Held, further, that a Court of Justice ought not to assist a party in his attempt to establish his own allegation of his own fraud.

APPEAL from an Order of Moore, L.C.J., refusing a motion by the defendant that the plaintiff should make discovery of documents.

The plaintiff brought an action for the recovery of £251 8*s.* 0*d.*, the amount of a taxed bill of costs of and incidental to the preparation and completion of a deed of settlement, dated 30th October, 1933, made between the defendant of the first part, the plaintiff, who was then the wife of the defendant, of the second part, and Ernest McMillen and Alexander C. Browne, trustees of the settlement of the third part. These costs were alleged to be due and payable under an agreement made between the defendant and the plaintiff on 10th March, 1933.

(1) In the Court of Appeal before Andrews and Best, L. JJ.

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This agreement recited that unhappy differences had arisen between the plaintiff and the defendant; that on 16th December, 1932, a decree for divorce *a mensa et thoro* was granted by the Lord Chief Justice to the plaintiff; and that the defendant had agreed to make provision for the support and maintenanee of the plaintiff and their daughter.

Clause 8 of the agreement provided that the defendant should pay the taxed costs as between party and party of the divorce proceedings both in the Courts and in Parliament, and the costs of the preparation, completion, and execution of the deed of settlement provided for in the agreement.

In his defence the defendant, in addition to traversing the agreement, pleaded that if he agreed to pay the costs claimed in the action or any costs on behalf of the plaintiff, the agreement was entered into in pursuance of a collusive bargain to make a settlement on the plaintiff and provide for the costs thereof, as part of an arrangement made between the plaintiff and the defendant, whereby the defendant agreed to assist the plaintiff in obtaining a divorce in the Courts of Justice and Parliament of Northern Ireland by supplying evidence of misconduct to plaintiff and her advisers on which proceedings might be maintained, and the defendant did supply such evidence and assisted the plaintiff to obtain the divorce.

The Lord Chief Justice in the exercise of his judicial discretion refused the application for discovery on the ground that he would not allow the Court to assist the defendant in establishing his own fraud.

The defendant appealed to the Court of Appeal.

Serjeant Sullivan and *McCarthy* for the appellant :—

It is not a question of privilege which the Court has to decide, it is whether or not an order should be made at all. We submit that under the rules and the settled practice of the Court, the defendant was entitled to this order as a matter of right.

The application was refused on the ground that the person applying for the order was *particeps criminis*,

but we submit that the defendant should not be deprived of his right to discovery merely because he was *particeps criminis*. Any objection to the disclosure of a document on the ground that it would tend to incriminate must be taken in the affidavit of documents. It is really an objection not to discovery but to production.

In *Longfield v. Aubrey* (1), it was held by the Master of the Rolls in Ireland that the Court will entertain a bill for a discovery, and to perpetuate evidence, in aid of a defence to an action at law on a contract although the discovery and evidence are to establish that the contract was void, as corrupt, illegal, and unconstitutional, and that both parties are in *pari delicto*.

In *Benyon v. Nettlefold* (2) the plaintiff being sued at law by the trustee of a woman to whom he had granted an annuity, in consideration of future illicit cohabitation, pleaded the illegal nature of the contract, and filed his bill against the trustee for discovery in aid of his defence. It was held, overruling the demurrer of the trustee, that the plaintiff was entitled to such discovery.

In *Spokes v. Grosvenor Hotel Co.* (3), it was held, that an objection by a defendant that the discovery of documents may tend to criminate him can only be taken to the production of the documents alleged to have that effect, and not to the order for discovery, and must be taken upon oath.

In *National Association of Operative Plasterers v. Smithies* (4), it was held by the House of Lords that in an action for damages for a conspiracy to induce workmen to break their contracts with the plaintiff the defendant cannot refuse to discover the material documents on the ground that they may tend to incriminate him.

Murphy, K.C., and *McCoy* for the respondent :—

In the present case *restitutio in integrum* is impossible. The application is made with the object of endeavouring

(1) 1 Hogan's Roll Court Reports 300.
(2) 3 Mac. & G. 94.
(3) [1897] 2 Q.B. 124.
(4) [1906] A.C. 434.

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to get evidence of a collusive bargain to defeat the ends of justice.

We submit that the defence pleaded by the defendant is one that he will not be entitled to raise at the trial. The Court will be slow to hold that such a defence can be maintained. The fact that in the present case a criminal conspiracy is alleged, distinguishes it from the other cases that have been referred to. Many of the documents, discovery of which is sought, are privileged.

The defendant is seeking to involve plaintiff in a criminal conspiracy.

We submit that the Lord Chief Justice was entitled to exercise his judicial discretion to refuse the motion, and that the order made by him should be affirmed.

Serjeant Sullivan (in reply):—

The decision of the Lord Chief Justice is directly contrary to *Longfield v. Aubrey* (1), and *Benyon v. Nettlefold* (2).

The Court will not on this present application decide a question of privilege. Communications between solicitor and client are not all privileged. The wife's solicitor is the husband's solicitor for certain purposes. In *Ottaway v. Hamilton* (3), it was held that a solicitor employed by a wife to take proceedings against her husband to obtain a divorce on the ground of cruelty and adultery, may sue the husband for "extra costs," *i.e.*, costs reasonably incurred by him beyond the costs taxed and allowed as between party and party.

His common law right to sue the husband as for "necessaries" supplied to the wife, is not to be limited to the statutable rights and remedies for costs given to the wife under the Divorce Acts.

The wife's solicitor has a retainer from the husband on which he may sue for his costs.

The order for discovery should be granted, unless good ground is shown for refusal.

(1) 1 Hogan's Roll Court Reports 300.
(2) 3 Mac & G. 94.
(3) 3 C.P.D. 393.

We submit that the Court should not break the line of authority which has been acted on for many years.

Cur. adv. vult.

ANDREWS, L.J. : This is an appeal from an order of the Lord Chief Justice, dated 6th July last, by which the defendant's motion that the plaintiff should make discovery of documents was refused. The action is brought for the recovery of £251 8*s.* 0*d.*, the amount of the taxed bill of costs of and incidental to the preparation and completion of a deed of settlement, dated 30th October, 1933, made between the defendant of the first part, the plaintiff, who was then the wife of the defendant, of the second part, and Ernest McMillen and Alexander C. Browne of the third part, which costs are alleged to be due and payable under an agreement made between the defendant and the plaintiff on 10th March, 1933

This agreement contains recitals that unhappy differences had arisen between the plaintiff and the defendant ; that on 16th December, 1932, a decree for a divorce *a mensa et thoro* was granted by the Lord Chief Justice to the plaintiff ; and that the defendant had agreed to make provision for the support and maintenance of the plaintiff and her daughter. By clause 8 thereof the agreement provides that the defendant should pay the taxed costs as between party and party of the divorce proceedings both in the Courts and in Parliament, and the costs of the preparation, completion, and execution of the deed of settlement provided for in the agreement. It is upon this clause that the plaintiff's claim is based. The defence to the action, in addition to a traverse of the agreement, contains the following remarkable paragraph :—

" If the defendant agreed to pay the costs claimed " in this action or any costs on behalf of the plaintiff " the said agreement was entered into in pursuance " of a collusive bargain to make a settlement on the " plaintiff and provide for the costs thereof, as part " of an arrangement made between the plaintiff and " the defendant whereby the defendant agreed to

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"assist the plaintiff in obtaining a divorce in the "Courts of Justice and Parliament of Northern "Ireland by supplying evidence of misconduct to "plaintiff and her advisers on which proceedings "might be maintained, and the defendant did "supply such evidence and assisted the plaintiff "to obtain said divorce"

This is simply a plea that a collusive bargain led to a collusive divorce. If the defendant's allegation as to the existence of such collusive arrangement be well founded, and if it had been brought to the notice of the Court or of Parliament, of course no such divorce should have been or would have been granted. In other words, the defendants' contention is that he was party to a successful conspiracy to prevent, obstruct, pervert, and defeat the course of justice.

The Lord Chief Justice in the exercise of his judicial discretion refused the application for discovery on the ground, as we were informed, that he would not allow the Court to assist the defendant to come in to establish his own fraud. He declined to set in motion the machinery of the Court to assist a party who was seeking to establish the existence of a corrupt and collusive bargain which, on his own admission, had resulted in the commission of the grave offence of deception of both the Courts of Justice and Parliament, and, accordingly, of perversion of the true course of justice.

Serjeant Sullivan presented two main arguments in support of the appeal. In the first place, he submitted that under the rules and settled practice of the Court he was entitled to this order as a matter of right, and not of judicial discretion. I cannot accept this contention. In my clear opinion, a discovery order is in modern practice essentially a discretionary order. No doubt, prior to the Judicature Act, and, to a certain extent, under the original rule 12 of Order 31, a discovery order was granted almost as a matter of course, but that has not been the accepted practice under the present rule; and in my opinion it is the duty of the Court to exercise a real, but, of course, judicial discretion in each case, and to refuse or limit the order in a

proper case. The nature and extent of this discretion is clearly stated by Sargant, J., in *Cory v. Cory* (1). No doubt the English rule upon which that case was decided contains a proviso which is not to be found in our corresponding rule; but that the decision did not depend upon the proviso is clear from the dictum of Sargant, J., made during Mr. Topham's argument that "the whole of rule 12 is discretionary." Again at p. 95 the learned judge refers to "the very wide "discretion given to the Courts under the rule"; and a few lines further down upon the same page he speaks of the discretion as "one of the broadest kind." Obviously, therefore, the Court has a discretion in the matter, and it is a discretion of such a character that we should not interfere with the decision of the Court of first instance unless we are satisfied that the discretion was not judicially exercised.

This brings me to Serjeant Sullivan's second argument, that the defendant should not be deprived of his right to discovery merely because he was *particeps criminis*, and that any objection to the disclosure of a document on the ground that it would tend to incriminate must be taken in the affidavit of documents, and was really an objection, not to discovery, but to production. He based this argument on several authorities which he brought to our notice. The earliest of these, *Longfield v. Aubrey* (2), and *Benyon v. Nettlefold* (3) are open to the comment that they were decided under the old practice of bills of discovery long prior to the Judicature Act or the rules made thereunder. Further, the report of the former case, which also dealt with a bill to perpetuate testimony, is very unsatisfactory. It sets out at length the considered judgment of Sir Wm. McMahon, M.R., showing clearly why in his opinion discovery should be refused in aid of a defence to the effect that the contract sued on respecting the representation of the borough of Mallow in Parliament was illegal, corrupt, and unconstitutional; and it merely ends with the

(1) [1923] 1 Ch. 90.
(2) 1 Hogan's Roll Court Reports 300.
(3) 3 Mac. & G. 94.

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words that the demurrer (which had been allowed by the M.R.) was overruled by Lord Manners on appeal. In *Benyon v. Nettlefold* (1), a man was sued by the trustee of a woman to whom he had granted an annuity in consideration of future illicit cohabitation. He pleaded the illegal nature of the contract based on an immoral consideration, yet was held entitled to discovery in aid of his defence. In my opinion this case does not assist the defendant, as it is clear from Lord Chancellor Truro's judgment that the ground of his decision was that the trustee by answering could not subject himself to any penalty. He contrasts the case with *Franco v. Bolton* (2), in which discovery was refused because it would have exposed the party to penalties.

Spokes v. Grosvenor and West End, etc., Ltd. (3), also cited by Serjeant Sullivan, appears to me to bear no real resemblance to the present case. A shareholder alleged conspiracy to defraud against the directors of a company and another person. It was held that an objection by a defendant that the discovery of documents might tend to criminate him can only be taken to the production of the documents alleged to have that effect, and not to the order for discovery, and that it must be taken upon oath. This proposition is beyond question ; but the granting of discovery to an innocent and injured plaintiff in that case, who was alleging fraud against others, is no authority whatever for the making of such an order in the present case, in which the party who asks for discovery does so in order to help him to sustain his own allegation that both he and the plaintiff had committed the grievous offence of perverting the course of justice.

Precisely the same observations apply to the last case which Sergeant Sullivan cited—*National Association of Operative Plasterers & Others v. Smithies* (4), which was an action for damages for a conspiracy to induce workmen to break their contracts with the plaintiff. In this case it was held that the defendant could not refuse to discover material documents on the

(1) 3 Mac. & G. 94.
(2) 3 Ves. Jun. 368.
(3) [1897] 2 Q.B. 124.
(4) [1906] A.C. 434.

ground that they might tend to incriminate him. The discovery order was sought by and granted to a plaintiff who had in no way disabled or disentitled himself by being *particeps criminis* in the alleged offence.

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In my opinion, therefore, the Lord Chief Justice's discretion was not fettered by the authorities to which Serjeant Sullivan referred ; and I have not the slightest hesitation in saying that it was properly exercised. A Court of Justice ought not in my opinion to assist a party in an attempt to establish his own allegation of his own fraud. Especially, it seems to me, should this be so, when, as in the present case, such fraud is alleged to have been practised upon the very Court whose assistance is invoked, and which, even if the fraud were established, would be powerless now to restore in its entirety the *status quo* which existed before the commission of the alleged fraud.

In conclusion, I would like to say that I was unable to obtain from the defendant's counsel any sufficient explanation as to why this application for discovery was made on notice ; for the practice is well established that in the King's Bench Division such application is made *ex parte*. However, the plaintiff, who was served with such notice, was clearly entitled to appear, and her counsel was heard by the Court without objection. She must, accordingly, have the costs of this appeal. (*Unrevised.*)

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BEST, L.J. : I have arrived at the same result as Lord Justice Andrews, but in a somewhat different way.

The claim in this case is for £251 8*s.* 0*d.*, being the amount of the taxed bill of costs of and incidental to the preparation and completion of a deed of settlement dated the 30th day of October, 1933, made between the defendant of the first part, the plaintiff of the second part and two named persons of the third part, which costs and moneys are due and payable to the plaintiff by the defendant under an agreement dated the 10th day of March, 1933, made between the defendant and the plaintiff.

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The defendant, in addition to a formal traverse of the making of the agreement, pleads that if he agreed to pay the costs claimed in the action or any costs on behalf of the plaintiff the said agreement was entered into in pursuance of a collusive bargain to make a settlement on plaintiff and provide for the costs thereof, as part of an arrangement made between the plaintiff and the defendant whereby the defendant agreed to assist the plaintiff in obtaining a divorce in the Courts of Justice and Parliament of Northern Ireland by supplying evidence of misconduct to plaintiff and her advisers on which proceedings might be maintained, and the defendant did supply such evidence and assisted the plaintiff to obtain said divorce.

Every petitioner seeking a divorce must aver in his or her petition that there is no collusion between the petitioner and the respondent and that averment must be, like others in the petition, verified by the affidavit of the petitioner. Without such verification the Court would not entertain the hearing of the petition as such verification is under our rules necessary to give the Court jurisdiction to proceed in the matter.

The plaintiff in the present case, who was the petitioner in the matrimonial proceedings, made an averment of "no collusion" in her petition and verified that averment by affidavit. This fact must have been known to the defendant and he knew or ought to have known that if there were any collusion between him and the petitioner in those proceedings, the suit for a decree of divorce *a mensa et thoro* must fail. It follows that the only defence to the present action is that the defendant entered into a collusive bargain with the petitioner in the matrimonial suit and that the agreement sued on resulted from, or was part of, or was entered into in pursuance of, that collusive bargain, and the position is that having acted in this way the defendant seeks the assistance of the Court to establish a defence based upon such conduct.

I do not think that any authority is necessary for the proposition that the Court should not, in circumstances such as are present here, give that assistance, but if such authority were needed, I think it can be deduced

from the judgment of Lindley, L.J., in the case of *Scott v. Brown & Others, Slaughter & May v. Brown & Others* (1). The learned Lord Justice at p. 728 says :

" *Ex turpi causâ non oritur actio.* This old and " well-known legal maxim is founded in good sense, " and expresses a clear and well-recognized legal " principle which is not confined to indictable offences. " No Court ought to enforce an illegal contract or " allow itself to be made the instrument of enforcing " obligations alleged to arise out of a contract or " transaction which is illegal, if the illegality is duly " brought to the notice of the Court, and if the person " invoking the aid of the Court is himself implicated " in the illegality. It matters not whether the " defendant has pleaded the illegality or whether he " has not. If the evidence adduced by the plaintiff " proves the illegality, the Court ought not to assist " him. If authority is wanted for this proposition, " it will be found in the well-known judgment of " Lord Mansfield in *Holman v. Johnson* (2)."

The principle here laid down by the Lord Justice is, in my opinion, applicable to the motion of the defendant in the present case. The defendant seeks to set up by way of defence to the action the illegality of the agreement to which he is a party and in which he is implicated. For the purpose of assisting him to establish that defence, he asks the Court to order the plaintiff to make discovery of documents and if the Court were to make such order it would, in my opinion, allow itself to be made the instrument of helping to enforce obligations arising out of an agreement which according to the defendant is plainly illegal.

The cases cited by Serjeant Sullivan are not, with the possible exception of *Longfield v. Aubrey* (3), in conflict with the principle here laid down. They merely decide that an objection by a party that discovery of documents may tend to incriminate him can only be taken to the production of the documents alleged to have that effect, and not to the order for discovery, and must be taken upon oath, and further that it is no answer to the making of the order to say that the

(1) [1892] 2 Q.B. 724.
(2) 1 Cowp. 343.
(3) 1 Hogan's Roll Court Reports 300.

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documents are of such a nature as might tend to incriminate the person ordered to make the discovery.

If the decision in *Longfield v. Aubrey* (1) is in conflict with that laid down in the judgment of Lindley, L.J., in the case already cited, I prefer to follow the latter, particularly as I cannot find that *Longfield v. Aubrey* is referred to as an authority in any modern book dealing with discovery.

I think that the Lord Chief Justice rightly refused discovery in this case and that his decision should be affirmed and the appeal should be dismissed with costs.

To avoid the possibility of misapprehension I wish to add that I have not even speculated as to what the ultimate result of the action is likely to be and I regard myself as entirely free to consider the whole matter afresh should the occasion to do so arise hereafter.

I have simply arrived at the conclusion that the Court ought not to assist in the setting up of a defence based on an agreement which, if entered into as the defendant by his pleading avows, was calculated to pervert the course of justice and presumably could only have been entered into by him with that object in view and for that purpose alone.

Solicitor for the appellant: *Charles B. W. Boyle.*
Solicitors for the respondent: *Cleaver & Fulton.*

J. McC.

(1) 1 Hogan's Roll Court Reports 300.

WILSON v. KENNEDY (1).

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Nov. 8, 13.

Poor-rate—House, offices, and land—Non-user of farm house by owner and occupier—Offices used as agricultural buildings—Occupation—Liability of owner.

The complainant sued the defendant who was the owner of a farm of land for £2 10*s.* 0*d.* Poor Rate for the year ending March 31st, 1934, in respect of the premises consisting of the farm house, offices and land.

The defendant contended that he was not in occupation of the farm house and was not liable to pay rates in respect thereof.

The Justices held that as the farm house was not used and was unfit to be used as a dwelling house during the year, and as the remaining and separate farm building was occupied and used as an agricultural building solely in connection with the farming operations the defendant was not liable to pay the rates claimed, and they dismissed the summons, but stated a case for the opinion of the King's Bench Division.

Held, by the King's Bench Division, Brown, J., and Megaw, J., that the Justices were wrong in dismissing the summons, and that as the defendant was in occupation of the whole tenement consisting of the farm house, offices, and land, he was liable to pay the amount claimed in respect of Poor Rate.

CASE STATED for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division, by the Justices sitting at Templepatrick Petty Sessions, held on 25th April, 1934, as follows :—

This is a case stated by us, the Justices, sitting at Templepatrick Petty Sessions, pursuant to the Summary Jurisdiction Act, 1857, 20 & 21 Vict., c. 43, on the application in writing of the said complainant who is dissatisfied with our determination (hereinafter set forth) as being erroneous in point of law, for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland.

At the Templepatrick Petty Sessions held on the 25th day of April, 1934, the complainant, who is a rate collector, sued the defendant, who is a farmer, by

(1) In the King's Bench Division before Brown, J., and Megaw, J.

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summons for the recovery of £2 10*s.* 0*d.*, being the amount alleged to be due by the defendant for poor rate for the year ending 31st March, 1934, in respect of portion of certain premises in the townland of Ballyutoag, Electoral Division of Ballysillan, and Rural District of Belfast, the whole of said premises consisting of a house, offices and land.

The facts as proved or admitted are as follows :—

The rateable annual valuation of the said premises is :—

Land £42. Other hereditaments £9. Total £51.

The total rate in respect of the said premises for the year ending 31st March, 1934, is £2 14*s.* 6*d.*, being the general District Rate at 109d. in the £ based on a valuation of £6, which is two-thirds of the said valuation of £9 on "other hereditaments"—the other third and the lands being regarded as agricultural hereditaments and exempt from the said rate. From the said £2 14*s.* 6*d.* there is deducted the equalization grant of 9d. in the £, that is to say, a total sum of four shillings and sixpence, leaving the said sum of £2 10*s.* 0*d.* claimed by the complainant. The defendant was during the whole of the year ending 31st March, 1934, owner in occupation of a farm of land containing 101 acres 3 roods in the townland of Ballyutoag, County Antrim. There are farm buildings upon the said lands consisting of a farm house with separate and distinct farm buildings. The farm house was not used by the defendant for any purpose whatsoever during the said year ending 31st March, 1934, nor for some years previous.

The farm house has been empty and idle for some years and is not now fit for use as a dwelling house.

The office houses were used by the defendant during the said year as agricultural buildings in connection with the working of the farm. A true copy of the entry in the rate book for said period relating to said lands and premises is attached to and forms part of this case.

A certificate of valuation in respect of said lands and premises is also attached to and forms part of this case.

The complainant contends :—

(*a*) That the defendant was liable to pay the amount claimed in the summons in respect of poor rate.

(*b*) That the Local Government (Rating and Finance) Act (Northern Ireland), 1929, did not affect the defendant's liability to pay the said rates.

(*c*) That the non-user by the defendant of the said farm house did not affect the defendant's liability to pay the said rates.

(*d*) That there was only one valuation for the said house, offices and lands and that there was not a separate valuation for the said house.

(*e*) That the land was the principal element for rating purposes.

(*f*) That the land was still valued for the purposes of rates.

(*g*) That the said land was still rateable and that the occupier thereof was still liable to pay rates thereon.

The complainant relied upon *Guardians of Croom Union v. Trench* 27 I.L.T.R. 28, and sections 3 (*a*), (*b*), (*c*) of the Local Government (Rating and Finance) Act (Northern Ireland), 1929.

The defendant contended :—

(*a*) That the defendant was not in occupation of the said farm house during the relevant period for any purpose whatsoever.

(*b*) That since the passing of the Local Government (Rating and Finance) Act (Northern Ireland, 1929, the said lands had ceased to be the principal element for rating purposes.

(*c*) That the defendant was not liable to pay rates in respect of the said house.

(*d*) That the said farm house was not accessory to the farm.

(*e*) That the separate farm building used solely as agricultural buildings were not subject to rates.

The defendant relied upon section 12 of the Poor Relief (Ireland) Act, 1862, and section 1 of the Local

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Government (Rating and Finance) Act (Northern Ireland), 1929, and *The Guardians of New Ross Union & Byrne* 30 L.R.I. 160.

We held that by reason of the provisions of the Local Government (Rating and Finance) Act (Northern Ireland), 1929, the decision in the case of *Guardians of Croom Union v. Trench* 27 I.L.T.R. 28, no longer applied to a case of this kind; and that as the farm house was not used during the year ending 31st March, 1934, and as the remaining and separate farm building was occupied and used as an agricultural building solely in connection with the farming operations and as no building on these lands was used for the purpose of a dwelling house the defendant was not liable to pay the rates claimed. We accordingly dismissed the summons.

And the opinion of the Court is sought as to whether we were right in law in dismissing the said summons.

Davison, K.C., and *Curran* for the complainant :—

Occupation is the test. The decision rests on whether the defendant is in occupation of the dwelling house within the meaning of the decided cases and the relevant sections of the statutes.

The word "occupier" is defined by section 124 of the Poor Relief (Ireland) Act, 1838, as including "every "person in the immediate use or enjoyment of any "hereditaments rateable under this Act, whether "corporeal or incorporeal." The rates are levied on the "occupier" as defined by that Act.

In *The Guardians of the Croom Union v. Trench* (1), it was held that where an unoccupied tenement is made up of lands and buildings, the land forming the principal element, the buildings being merely accessory, the owner is in occupation of the buildings for purposes of rating.

We say that in the present case the dwelling house is accessory to the farm and that the defendant must be taken as being in occupation of the dwelling house.

The farm house and the offices are accessory to the

(1) 27 I.L.T.R. 28.

farm. The defendant being in occupation of the land must be treated as being in occupation of the farm house.

There is substantially a finding of fact in the case stated that the farm house and offices were accessory to the farm.

In *Guardians, Callan Union v. Armstrong* (1), on the expiration of a lease, the owner in fee of grass lands went into possession of them. For a period of three years he was unable to let them, and during this time they were neither meadowed, grazed, nor cropped. It was held, that the owner was liable to poor rates made in these years, as being the occupier of the lands within the meaning of the 1 & 2 Vict., c. 56.

The Guardians, New Ross Union v. Byrne (2), was quite different from the present case. There it was found in the case stated that the buildings were "unoccupied." The judgments in that case are not in favour of the defendant in the present case. The judgments in that case, of Gibson, J., and Johnson, J., are clearly in favour of the complainant here.

E. S. Murphy, K.C., and *J. D. Chambers* for the defendant :—

The farm house if accessory at all is accessory to something which is not subject to this particular rate, how then can that building be rateable. The farm house is a separate entity. The law with regard to empty houses should be applied to this dwelling house. The words of the case stated show that the Justices have dealt with this farm building as being unfit for use as a dwelling house. The findings of fact in the case stated could not be more clearly in the defendant's favour. What could be clearer than this sentence taken from the case stated : "The farm house has been "empty and idle for some years and is not now fit "for use as a dwelling house" ? How can a house be accessory when it is unfit for the use for which it was built ? A house that is useless cannot be accessory to something else. The defendant is contesting his

(1) 16 L.R.I. 33. (2) 30 L.R.I. 160.

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liability for rating on the ground that the dwelling house is unfit for use.

The Guardians of the Croom Union v. Trench (1), is no authority for the proposition contended for on behalf of the complainant.

We submit that the occupancy of the land cannot entail occupation of something which cannot be used as a dwelling house. There is a clear finding of fact on the question of occupation.

We say that the whole rate must go, because if the rate on the dwelling house goes, there is nothing left.

We submit that the net point is that a rate has been struck on the only element to be rated.

The decision in the case of the *New Ross Union v. Byrne* (2), is in the defendant's favour. Occupation of the land does not entail occupation of the dwelling house. It would be a strange result, if the defendant were to be deemed to be in possession of a dwelling house which it is admitted he does not in fact occupy.

We rely on the words used by Lord Atkinson in *Liverpool Corporation v. Chorley Union Assessment Committee* (3), where he said: "When the statute, "therefore, enacts that the occupier of a house should "be rated, it must mean that the person to be rated "shall occupy the house *as a house;* that is, that he "shall use the house for the purpose of living in it, "or sojourning in it, or working in it, keeping animals "in it, storing other chattels in it, or using it for some "such other purpose as houses may reasonably be "devoted to; and that, as a vacant house is not used "for any of these purposes, it is not occupied *as a house* "within the meaning of the statute." These words supply an authoritative definition of what occupation of a house amounts to. If the dwelling house stood by itself it could not be rated.

In *Sligo County Council v. Cooke* (4), it was held that the owner of untenanted lands is not necessarily in every case to be deemed the occupier for the purposes of the Poor Relief Acts and rateable as such. The owner of such lands may not be "in the immediate

(1) 27 I.L.T.R. 28.
(2) 30 L.R.I. 160.
(3) [1913] A.C. 197, 211.
(4) [1932] I.R. 367.

" use or enjoyment " of the lands within the meaning of section 124 of the Poor Relief (Ir.) Act, 1838.

Greater weight should be attached to the judgments in the case of *Guardians, New Ross Union v. Byrne* (1), as compared with the judgment in the case of the *Guardians of the Croom Union v. Trench* (2).

The owner of the dwelling house cannot be said to be in rateable occupation of the dwelling house simply because he is in occupation of the land.

In *Ryde on Rating* (6th edition) it is stated that the ruling in *Winstanley v. North Manchester Overseers* (3), " is not applicable to a case in which the land in question " was not being used at all, nor can the decision be " cited as authority for the proposition that mere " ownership (without any acts of user by anybody) is " enough to make the owner rateable as occupier."

We submit that the magistrates were justified in dismissing the summons.

Davison, K.C. (in reply) :—

In *The King v. St. Mary The Less* (4), it was held that if the owner of a house occupy part of it, he is liable to be rated to the poor for the whole, unless there be a distinct occupation of the rest by some other person.

Occupation of part of the rated premises is occupation of the whole, unless some one else is in occupation of part of the premises.

In *The King v. Aberystwith* (*Inhabitants*) (5), one who went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, which for this purpose was parted off by laths from the rest, and left the key of the house door with a friend, and had the garden cultivated for his own benefit as usual, was held liable to be rated to the relief of the poor as occupier of the whole house.

This statement appears in the case stated : " the " defendant was during the whole of the year ending " 31st March, 1934, owner in occupation of a farm of

(1) 30 L.R.I. 160.
(2) 27 I.L.T.R. 28.
(3) [1910] A.C. 7.
(4) 4 T.R. 477.
(5) 10 East, 354.

K.B.D. 1934.

WILSON v. KENNEDY.

"land containing 101 acres 3 roods, in the townland "of Ballyutoag, County Antrim."

The facts as they appear in the case stated are not sufficient to prevent the defendant from being rated.

In *Winstanley v. North Manchester Overseers* (1), Lord Atkinson said in his speech in the House of Lords, "owners in possession are *primâ facie* occupiers, unless "it be shown that the occupation is in some one else."

The present case is of great importance to county councils and rating authorities. The defendant has not appealed against the rating of the buildings, and we submit that the fact that he does not use part of the buildings does not make the rating bad.

The trend of the decided cases is in favour of the argument for the complainant.

The defendant could have applied to have the farm buildings separately valued.

The Local Government (Rating and Finance) Act (Northern Ireland), 1929, does not sever the unit of valuation, nor does it affect the law of valuation.

BROWN, J.

BROWN, J.: This case comes before us for our decision, by way of case stated.

The defendant was during the whole of the year ending 31st March, 1934, owner in occupation of a farm of land. There are farm buildings upon the lands consisting of a farm house with separate and distinct farm buildings. The farm house has been empty and idle for some years and is not now fit for use as a dwelling house. The office houses were used by the defendant as agricultural buildings in connection with the working of the farm.

In the Rate Book the tenement is described as consisting of house, offices, and land. The importance of that description is that the tenement constitutes one rateable entity. By the operation of the Derating Acts, agricultural land has been freed from rates. The dwelling house is not occupied by the defendant.

The view that I take of the matter is that the tenement consisting of house, offices and land constitutes one rateable entity. The outbuildings and

(1) [1910] A.C. 7, 14.

dwelling house are accessory to the farm. The defendant is the occupier of the whole tenement, although it is found in the case stated that the farm house has been empty and idle for some years and is not now fit for use as a dwelling house. The case stated describes the premises as consisting of a house, offices, and lands. It finds that the rateable annual valuation of the premises is—Land £42, other hereditaments £9, total £51 0*s.* 0*d.* The defendant is in occupation of the whole tenement as so described.

It is true that *Guardians, New Ross Union v. Byrne* (1), has been relied on by the defendant, but I do not think that there is anything in that case which substantiates the argument for the defendant. The circumstances there were very different. The defendant also relied on the Local Government (Rating and Finance) Act (Northern Ireland), 1929, but I do not think that that Act affects the matter.

I am of opinion that the defendant is in occupation of the whole tenement. This does not involve any real hardship as it was open to the defendant to have applied to have the land valued separately.

In my opinion the magistrates were wrong in law in dismissing the summons.

We think, however, that as this was a test case, each party should abide his own costs.

MEGAW, J. : I concur.

MEGAW, J.

There are two questions to be decided in this case. These questions are (*a*) were the premises occupied, (*b*) did the premises consist of one undivided tenement or separate tenements.

The Guardians, New Ross Union v. Byrne (1), is entirely in the complainant's favour so far as it declared the law. The actual decision was based on the express finding of fact that the rated premises were unoccupied when the rates were made, and so continued. So far as I can see there is nothing in the facts as they appear in the case stated to preclude the Court from arriving at a decision in favour of the complainant. The finding of the Justices in the present case is that "the de-

(1) 30 L.R.I. 160.

K.B.D. 1934.

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MEGAW, J.

"fendant was owner in occupation of a farm of land "containing 101 acres 3 roods in the townland of "Ballyutoag, in the County of Antrim," and further states that "there are farm buildings upon the said "lands consisting of a farm house with separate and "distinct farm buildings and that the farm house was "empty and idle for some years but that the office "houses were used."

The magistrates base their decision on the ground that no building on the lands was used for the purpose of a dwelling house. The first question to be decided is whether this is a finding of fact that prevents the Court from deciding in favour of the complainant. The findings are to some extent at variance with each other and in my opinion if there is a finding that part of the rated premises were unoccupied at the rating period, such finding appears from the facts stated to be based on a wrong interpretation of the law. As declared by Gibson, J., in *Guardians, New Ross Union v. Byrne* (1), "The form of list prescribed by Schedule "to 23 Vic., c. 4, makes it clear that though distinct "values are placed on buildings and on land, the "tenement is not partitioned as a rateable entity." The tenement here was the farm consisting of the houses and lands and it seems to me that the finding that the defendant was in occupation of the farm is the proper finding in law. Under the Valuation Acts the tenement valued is properly treated as a whole while the separate elements making up the whole are set out.

It is necessary that the valuation of the lands and buildings should appear separately. In assessments for Income Tax different allowances are made for land and buildings, and agricultural land as distinct from buildings has had special privileges as regards relief of rates since the Local Government (Ireland) Act, 1898. The fact that the constituent parts of the valuation are set out does not prevent the whole tenement from constituting one rateable entity. This was an agricultural holding managed as such, and there is nothing before us to show that any actual splitting up of it into parts has been made. I do not see that any part of it was accessory to any other.

(1) 30 L.R.I. 160.

I think that the decision come to by the magistrates was wrong.

I wish to say how much I was impressed by the masterly presentation of his argument by Mr. Curran.

Solicitor for the complainant: *William Currie.*

Solicitor for the defendant: *J. Morris McKee.*

J. McC.

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REILLY v. MOORE (1).

Oct. 30.

Statutory Duty—Action under Statute—Amount due for wages in lieu of holidays—Penalty—Shop Assistant—Shops Act, 1912 (2 *Geo.* 5, *c.* 3) *section* 21 (6) *and Fifth Schedule.*

Under section 21, sub-section 6, of the Shops Act, 1912, and the Fifth Schedule thereto, on failure to comply with the provisions of that Schedule, the occupier of the shop is guilty of an offence against the Act and is liable to the penalty therein prescribed.

The Schedule provides for an annual holiday for shop assistants without deduction from wages or salary.

The plaintiff brought a civil bill claiming the sum of £9 0*s.* 0*d.*, being the amount due by the defendant for four weeks wages in lieu of the holidays which he had not received.

The Deputy Recorder of B. gave a decree for £9 0*s.* 0*d.* The defendant appealed to the High Court.

Held, by Best, L.J., affirming the judgment of the Deputy Recorder that the plaintiff had a right of action for defendant's breach of statutory duty to give him a fortnight's holiday with full pay in each year and that this right was available in addition to the remedy for recovery of a penalty.

APPEAL from a decision of the Deputy Recorder of Belfast giving judgment for the plaintiff in a civil bill brought to recover the sum of £9 0*s.* 0*d.* for four weeks' wages in lieu of holidays to which plaintiff was entitled under the Shops Act, 1912.

The plaintiff went to work as a barman to the defendant in September, 1931, and continued in his employment up to November, 1933, a period of a little more than two years. His wages were £2 5*s.* 0*d.* weekly.

Section 21, sub-section 6, of the Shops Act, 1912, provides that in the case of a shop assistant employed in a shop in which the business of the sale by retail of intoxicating liquors is carried on, section one of this Act shall not apply, but instead thereof, the provisions contained in the Fifth Schedule to this Act shall have effect with respect to shops in which that business is carried on, and, in the case of any contravention of,

(1) In the King's Bench Division before Best, L.J.

or failure to comply with, the provisions of that schedule, the occupier of the shop shall be guilty of an offence against this Act, and shall be liable to a fine not exceeding (*a*) in the case of a first offence, one pound; (*b*) in the case of second offence, five pounds; and (*c*) in the case of a third or any subsequent offence ten pounds.

The seventh clause of the Fifth Schedule provides that an assistant who has been employed by the same employer for a period of not less than twenty-six consecutive weeks about the business of one or more shops of the employer shall, so long as he continues in the employment of that employer, be allowed an annual holiday of at least seven consecutive days or, if he has been employed as aforesaid for a period of not less than fifty-two consecutive weeks, an annual holiday of at least fourteen consecutive days. The ninth clause of the Schedule provides that no deduction from wages or salary payable to the assistant shall be made on account of any such holidays.

The defendant was the occupier of a shop to which the provisions of section 21 and of the Fifth Schedule to the Shops Act, 1912, apply. During two separate periods of fifty-two consecutive weeks, the plaintiff had been employed by the defendant, and had no holidays during either of those periods.

T. J. Campbell, K.C., for the appellant:—

It is admitted that the plaintiff had been employed during two periods of fifty-two consecutive weeks and had not got an annual holiday of fourteen consecutive days in either period.

The Act did not create private rights enforceable by action. A private remedy was not provided. For the breach of the statutory duty, the penalty imposed by the Act was the only remedy. The duty created was a public duty. The Act was one in the public interest. *Atkinson v. Newcastle Waterworks Co.* (1).

The plaintiff has not suffered particular damage.

(1) 2 Ex. D. 441.

K.B.D. 1934.

REILLY v. MOORE.

[He referred to section 14 (3) of the Shops Act, 1912, and to sections 69 and 70 of the National Insurance Act, 1911.]

Warnock, K.C., and *Marrinan* for the plaintiff:—

The Shops Act, 1912, is linked up with the Factory Acts, and these Acts are intended not for the protection of the public at large, but for the benefit of a particular class of persons (in this case of assistants employed in licensed premises).

The possibility of a private right of action for the breach of a statutory duty must depend on the scope and language of the statute taken as a whole.

[They referred to *Ward v. Hobbs* (1), *Gorris v. Scott* (2), *Phillips v. Britannia Hygienic Laundry Co.* (3), *Britannic Merthyr Coal Co., Ltd. v. David* (4), and *Groves v. Wimborne* (*Lord*) (5).]

Cur. adv. vult.

BEST, L.J.

BEST, L.J.: This is an appeal by the defendant against a decree for £9 given by the learned Acting Recorder (E. J. McKean, Esq., K.C.) to the plaintiff which sum was claimed for "amount due the plaintiff "by the defendant for four weeks' wages in lieu of "holidays in contravention of the Shop Hours Act."

The question for decision arises on the construction of section 21, sub-section (6), of the Shops Act, 1912 (not the Shop Hours Act as stated in the process) and of the Fifth Schedule to the Act. That sub-section provides that in the case of a shop assistant employed in a shop in which the business of the sale by retail of intoxicating liquors is carried on, section one of this Act shall not apply, but, instead thereof, the provisions contained in the Fifth Schedule to this Act shall have effect with respect to shops in which that business is carried on, and, in the case of any contravention of, or failure to comply with, the provisions of that Schedule, the occupier of the shop shall be guilty of an offence

(1) 4 A.C. 13, 23.
(2) L.R. 9 Ex. 125.
(3) [1923] 2 K.B. 832.
(4) [1910] A.C. 74.
(5) [1898] 2 Q.B. 402.

against this Act, and shall be liable to a fine not exceeding :—

(*a*) in the case of a first offence, one pound ;

(*b*) in the case of a second offence, five pounds ; and

(*c*) in the case of a third or any subsequent offence, ten pounds.

The Fifth Schedule contains provisions with respect to shops in Ireland in which the business of the sale by retail of intoxicating liquors is carried on, and the purpose of those provisions is amongst others to limit the hours in each week during which the assistants in such shops may be employed, to regulate the intervals for meals on each week-day, to specify the maximum amount of overtime to be worked by each assistant in any calendar year, to provide a weekly half-holiday for each assistant and to lay down conditions of employment calculated to ameliorate the lot of such assistants and to promote their well-being and health. The seventh clause of the Schedule provides that an assistant who has been employed by the same employer for a period of not less than twenty-six consecutive weeks about the business of one or more shops of his employer shall, so long as he continues in the employment of that employer, be allowed an annual holiday of at least seven consecutive days, or, if he has been employed as aforesaid for a period of not less than fifty-two consecutive weeks, an annual holiday of at least fourteen consecutive days, and the ninth clause of the Schedule provides that no deduction from wages or salary payable to the assistant shall be made on account of any such holidays or half-holidays as aforesaid.

The plaintiff is a shop assistant and the defendant is the occupier of a shop to which the provisions of section 21 and of the Fifth Schedule apply, and it is admitted that during two separate periods of fifty-two consecutive weeks the plaintiff has been employed by the defendant, and that he has had no holidays in either of those periods, and the question is whether he has a right of action against the defendant for the admitted breach of the provisions of the Act. Mr. Campbell, K.C., for the defendant, submits that the

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Shops Act, 1912, does not give the plaintiff the right of action mentioned in the civil bill or any right of action, that in fact no matter how often the provisions of the Statute are broken the only remedy applicable to any breach is the taking of proceedings for the penalties set out in section 21, sub-section (6), and that there is nothing in the Act to suggest that the plaintiff has a personal remedy such as is claimed in the civil bill. He says in effect that as a penalty has been imposed by the Act for the breach of a statutory duty no action by the shop assistant lies against his employer. He instances the case of the National Insurance Act, 1911, section 69 of which creates certain offences, and section 70 of which gives an employed contributor a right of action against the employer for neglecting to pay the contributions required by the Act to be paid by him, notwithstanding that proceedings for penalties have been taken against the employer for such neglect or failure, and from this he argues that as the Shops Act contains no provision for a civil remedy no such remedy is available to plaintiff. This argument though deserving of consideration is not, I think, decisive against plaintiff for reasons to be stated later.

Again, Mr. Campbell relies upon section 14 sub-section (3) of the Act. That sub-section relieves an employer from liability if, when the commission of an offence has been proved, he can show that he has used due diligence to enforce the execution of the Act and that some other person whom he charges to be the actual offender has committed the offence in question without his knowledge, consent or connivance, and Mr. Campbell submits that if the construction of the Statute for which Mr. Warnock contends on plaintiff's behalf be right, the employer would be acquitted under sub-section (3) but would be still liable as regards the civil remedy, and that this is a result not to be contemplated.

It is true that in the circumstances mentioned no offence has been committed by the employer and no penalty can therefore be incurred by him, but by sub-section (2) of the same section it is provided that the

person by whom in fact the offence has been committed—whether manager, agent, servant, or other person—shall be liable to the like penalty as if he were the occupier, and to argue from this that the occupier cannot be liable in damages to his assistant is on a par with the argument that the owner of a motor car is necessarily not liable in damages to a person who has suffered injuries caused by the negligent driving of the car because the car was driven by the owner's servant and because the servant in driving it had acted so negligently and recklessly as to commit an offence. I think in each case the argument is unsound and should be rejected. Plaintiff's claim in substance is that he has been injured by defendant's breach of statutory duty to give him a fortnight's holiday with full pay in each year, and defendant's answer is that as a penalty has been imposed in the Statute for the breach of duty no other remedy lies.

There are cases in the books in which it has been held that the private remedy, though not specifically mentioned in the Statute, is nevertheless available in addition to the recovery of a penalty. One of such cases is *Groves v. Wimborne* (*Lord*) (1), in which it was decided that an action will lie in respect of personal injury occasioned to a workman employed in a factory through a breach by his employer, the occupier of the factory, of the duty to maintain fencing for dangerous machinery imposed upon him by section 5, sub-section 4, of the Factory and Workshop Act, 1878. A. L. Smith, L.J., giving judgment in the case, says at p. 407, "unless it appears from the whole 'purview' of the "Act, to use the language of Lord Cairns in the case "of *Atkinson v. Newcastle Waterworks Co.* (2), that "it was the intention of the Legislature that the only "remedy for breach of the statutory duty should be "by proceeding for the fine imposed by section 82, it "follows that, upon proof of a breach of that duty by "the employer and injury thereby occasioned to the "workman, a cause of action is established." Further on the learned Lord Justice says, In dealing with the question of the intention of the Legislature it is

(1) [1898] 2 Q.B. 402. (2) 2 Ex.D. 441.

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material, as Kelly, C.B., pointed out in giving judgment in the case of *Gorris v. Scott* (1), to consider for whose benefit the Act was passed, whether it was passed in the interests of the public at large or in those of a particular class of persons.

In the same case, Rigby, L.J., at p. 411, says that "substantially the only question to be decided is the "question as to the true construction of the Factory "and Workshop Act, 1878—that is to say, whether "having regard to the whole purview of that Act, the "clauses which provide a penalty for a breach of its "provisions are intended to give the only remedy for "such a breach," and he agrees that this construction should not be put upon these clauses in the case which he is considering. The question whether in any particular case a right of action is conferred upon an individual for breach of statutory duty in addition to any penalty that may be recoverable for such breach is discussed at length in *Phillips v. Britannia Hygienic Laundry Co.* (2). That was an action brought by the plaintiff for damages to his van caused by the lorry of the defendants in consequence, as alleged, of certain breaches by the defendants of regulations made under the Locomotives on Highways Act, 1896.

Atkin, L.J., as he then was, at p. 840, puts the matter thus. He says: "This is an important "question, and I have felt some doubt upon it, because "it is clear that these regulations are in part designed "to promote the safety of the public using highways. "The question is whether they were intended to be "enforced only by the special penalty attached to "them in the Act. In my opinion, when an Act "imposes a duty of commission or omission, the "question whether a person aggrieved by a breach of "the duty has a right of action depends on the in-"tention of the Act. Was it intended to make the "duty one which was owed to the party aggrieved as "well as to the State, or was it a public duty only? "That depends on the construction of the Act and "the circumstances in which it was made and to which "it relates. One question to be considered is, Does

(1) L.R. 9 Ex. 125. (2) [1923] 2 K.B. 832.

"the Act contain reference to a remedy for breach of "it? *Primâ facie* if it does that is the only remedy. "But that is not conclusive. The intention as "disclosed by its scope and wording must still be "regarded, and it may still be that, though the statute "creates the duty and provides a penalty, the duty "is nevertheless owed to individuals."

In the present case the Act, no doubt, provides specific remedies for any contravention of, or failure to comply with, the provisions of the Fifth Schedule and contains no reference to any other remedy for breach of it, and this is the strength of Mr. Campbell's argument for the defendant, but as pointed out by Atkin, L.J., in the passage just cited, this is not conclusive against the plaintiff. The duties imposed by the Schedule are clearly duties owed to individual shop assistants and this is a material consideration in discovering the intention of the Legislature. I do not think it appears from the whole "purview" of the Act, to use the language of Lord Cairns in *Atkinson's* case (1), that it was the intention of the Legislature that the only remedy for breach of the statutory duty to provide the specified holidays should be by proceeding for the fines imposed by section 21, subsection (6), of the Act. I think in a proper case the aggrieved assistant has a right of action against his employer and that the present is such a case.

Two points remain to be considered. Mr. Campbell says that plaintiff has suffered no injury. It is true that no evidence was given on the subject of injury and it is not suggested that any apparent physical damage, such as may result to a person involved in an accident, affects the plaintiff, but if the Legislature deemed it necessary for the well-being of the class to which plaintiff belongs that holidays should be provided for members of that class it is not an unwarranted inference that plaintiff's health must have been impaired to some extent by his having been deprived of the holidays provided for in the Schedule to the Act.

The other point concerns the measure of damages. In each year in respect of which defendant has been

(1) 2 Ex.D. 441.

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sued he obtained the services of the plaintiff for two weeks without a money payment and whilst no satisfactory basis for measuring the damage incurred by the plaintiff has been placed before me I think that the sum awarded by the learned Acting Recorder meets the justice of the case.

The appeal will be dismissed with costs both here and in the Civil Bill Court.

Solicitors for the appellant : *Joseph Donnelly & Co.*
Solicitors for the respondent : *N. & F. Tughan.*

J. McC.

GARDINER v. O'ROURKE AND OTHERS (1).

C.A. 1935.

April, 18.

Probate—Practice—Trial by Jury—The Court of Probate Act (Ireland), 1857 (20 & 21 *Vict., c.* 79) *section* 41—*Rules of the Supreme Court (Ireland)*, 1905, *Order* 36, *rule* 2.

In an action for the revocation of a grant of probate there being serious questions to be tried as to the testator's testamentary capacity and as to his knowledge and approval of the contents of the will and the assets being substantial,

Held, by the Court of Appeal, that the plaintiff was entitled to have the action tried by a jury.

APPEAL from so much of an Order of Moore, L.C.J., dated 22nd March, 1935, made upon the hearing of a summons brought by the plaintiff, as ordered that an action for the revocation of a grant of probate be set down for trial before a judge without a jury.

Charles Edward Tench Leslie died on 5th August, 1934, having made three alleged wills dated respectively, 12th February, 1875; 30th July, 1934, and 2nd August, 1934, leaving personal and real estate in Northern Ireland valued over £3,000. On 23rd August, 1934, probate in common form was granted to the defendants of the alleged will, dated 2nd August, 1934. The plaintiff who claimed as a beneficiary under the alleged will, dated 12th February, 1875, brought an action to revoke the said probate.

The pleadings raised issues as to the testator's testamentary capacity and as to his knowledge and approval of the contents of the alleged wills. Upon an application by the plaintiff *inter alia* for the trial of the action by a judge with a special jury, Moore, L.C.J., refused the application.

Murphy, K.C., Black, K.C., and *Johnson* for the appellant:—

Section 41 of the Court of Probate Act (Ireland), 1857, contemplated that the normal mode of trial was

(1) In the Court of Appeal before Andrews and Best, L.JJ.

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GARDINER v. O'ROURKE AND OTHERS.

by jury as it is only the refusal of a jury which is subject to appeal.

The settled practice of the Irish Courts is set out in *Maxwell's Probate Practice*, at page 290: "Where the "formal execution only of the will or codicil is im- "peached or where the defendant has given notice "under Order XXI, rule 18, merely to cross-examine "the attesting witnesses the case is usually tried "without a jury—but if capacity is impeached, or "undue influence alleged, the Court seldom acts "without the aid of a jury—though some exceptional "cases have occurred which, on account of the small "amount of assets, and the poverty of the parties, "and on their request, were disposed of by the judge "alone."

In *Queen's Proctor v. Williams* (1), an interest suit in which a question of legitimacy was raised between a person claiming to be the lawful nephew and next-of-kin of a deceased intestate and the Queen's Proctor, the Court directed the issues joined to be tried by a jury, on the application of a next-of-kin, although the application was opposed by the Queen's Proctor.

In *Wedderburn v. Pickering* (2), Jessel, M.R., said at page 771: "I am very unwilling to interfere with "the right given by the Judicature Act to a defendant "to have his action tried before a jury, and I do not "forget that this common law right, if I may so call "it, ought not to be taken away by mere caprice but "only where there is some reason why the case cannot "be conveniently tried before a jury."

McGonigal, K.C., *Lowry, K.C.*, and *MacDermott* for the respondents:—

This was a matter in which the Lord Chief Justice had a discretion and there were materials which would justify him in exercising his discretion, *e.g.*, where if the suit were tried before a jury the number of wills involved might introduce confusion in the minds of the jury.

(1) 31 L.J.P. 86.

(2) 13 Ch.D. 769, 771.

No person, save an heir-at-law, is entitled as of right to have a probate action tried before a jury. The discretion is given most explicitly by Order 36, rule 2. The Lord Chief Justice having exercised his discretion the onus is thrown upon the appellant of shewing that he exercised such discretion upon a wrong principle.

In *Burgoine v. Moordaff* (1), Baggalley, L.J., referring to such discretion said: "Some expressions of James, "L.J., in *Ruston v. Tobin* (2), gave rise to a notion "that the exercise of such discretion could not be "interfered with by the Court of Appeal; but the "principle upon which the Court proceeds was accur- "ately laid down in *In re Martin* (3), that an appeal "lies, but that there must be a plain and clear case to "justify the Court of Appeal in interfering. That is "the true rule—the Court of Appeal will not interfere "unless it is clear that the discretion has been wrongly "exercised."

The practice in these Courts has, since the decision in *Steele v. Gilliland* (4), tended against the granting of trial by jury in probate actions.

[They also referred to *Watkins v. Reddy* (5), and *The Temple Bar* (6).]

ANDREWS, L.J.

ANDREWS, L.J.: This motion has been very fully argued before us. The plaintiff's claim to a jury rests upon section 41 of the Probate Act (Ireland), 1857, and the established practice thereunder. That section provides that, "It shall be lawful for the Court of "Probate to cause any question of fact arising in any "suit or proceeding under this Act to be tried by a "special or common jury before the Court itself, and "such question shall be so tried by a jury in any case "where an heir-at-law, cited or otherwise made party "to the suit or proceeding, makes application to the "Court of Probate for that purpose." Pausing here, it is clear that an heir-at-law is entitled to a jury as a matter of absolute right.

Continuing the section we come to the second case, "and in any other case where all the parties to the suit

(1) 8 P.D. 205.
(2) 10 Ch.D. 558.
(3) 20 Ch.D. 365.
(4) [1928] N.I. 18.
(5) [1932] P.D. 98.
(6) 11 P.D. 6.

C.A. 1935.

GARDINER v. O'ROURKE AND OTHERS.

ANDREWS, L.J.

"or proceeding concur in such application." In this case there may be some doubt as to whether trial by jury is a matter of right or not. My present opinion of the true construction of the section, having regard particularly to its punctuation, is that in this case there is not an absolute right to a jury. The Court in my opinion has a discretion, but that discretion is subject to appeal. That is clearly the view taken by Mr. Maxwell in his edition of *Miller's Probate Practice*, at page 290. "The Court," he says, "has a discretion "as to the mode of trial except when the heir-at-law "asks for a jury." This point has not, however, to be decided upon this appeal, and I am, accordingly, not to be taken as expressing any final judicial determination upon it.

The third case provided for in the section is the one which we have to consider here—"and where any "party or parties other than such heir-at-law make a "like application (the other party or parties not "concurring therein) and the Court shall refuse to "cause such question to be tried by a jury, such "refusal of the Court shall be subject to appeal." Now, in my opinion, the language of this part of the section is very special in this respect that it expressly confers a unilateral right of appeal. It is only where the Court refuses an order for a jury that a right of appeal is granted. There is no appeal under the section from an order directing trial by jury. I interpret such a provision as a clear statutory declaration that *primâ facie* a right to a jury exists, of which a party should only be deprived by special circumstances. This view of the section not only accords with my own recollection of the practice, but also with the statement regarding it contained in Mr. Maxwell's Work at page 290. "Where," he says, "the formal execution only of the will or codicil is "impeached, or where the defendant has given notice "under Order 21, rule 18, merely to cross-examine the "attesting witnesses, the case is usually tried without "a jury—but if capacity is impeached, or undue "influence alleged, the Court seldom acts without the "aid of a jury—though some exceptional cases have

"occurred which, on account of the small amount of "assets, and the poverty of the parties, and on their "request, were disposed of by the judge alone."

This, it seems to me, is a perfectly clear expression of the practice of the Courts as it formerly existed in Dublin. I am clearly of opinion that, in the absence of any legislative amendment, this well settled practice ought to be adhered to. Mr. Lowry, however, on behalf of the respondent, whilst admitting that the practice in Dublin had always been that "where the "parties were agreed or one party asked for it a jury "was given as a matter of course," boldly asserted that a change in this practice had taken place during recent years in these Courts. This was denied by counsel for the appellant, and officers of the Court whom we have consulted upon the matter are unable to confirm this view. Mr. Lowry alleged that the change of practice for which he contended was consequent upon the order of this Court in *Steele v. Gilliland* (1), in which the verdict of a jury was set aside as such that no jury could reasonably find. It appears to me to be quite untenable to say that a well established Court practice based on Statute would be changed because of the fact that in one particular case the jury's verdict could not be supported.

In my opinion there are issues in the present case which seem to me to be such as ought properly to be tried by a jury. Pleas of testamentary capacity and of knowledge and approval of the contents of the alleged wills have to be determined. There are substantial assets, and no question of poverty of the parties has been raised. The fact, that three alleged wills are in issue is no reason why the usual practice should be departed from.

I would wish to add my regret that the motion was not argued before the Lord Chief Justice with the same degree of care as before us. If his attention had been directed, as ours has been, to the Statute and to Mr. Maxwell's statement of the practice, I feel certain that his order would have been different.

In my opinion, for the reasons mentioned, the order of the Lord Chief Justice must be reversed with costs.

(1) [1928] N.I. 19.

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BEST, L.J.

BEST, L.J.: I agree. It appears that the facts were not fully opened to the Lord Chief Justice upon the original motion. In my opinion if they had been, and if the law applicable thereto had been fully discussed before him as it has been before us he would not have arrived at a decision which interferes with the established practice.

By section 41 of the Probate Act (Ireland), 1857, trial by jury is favoured by the Court. Only the refusal of a jury is subject to appeal. For the reasons given by my brother Andrews I agree that the order of the Lord Chief Justice should be reversed.

Solicitors for the appellant: *Fisher & Fisher.*
Solicitor for the respondents: *Patrick J. Haughey.*

J. R.

THE KING (SHERRY) v. THE COUNTY COURT JUDGE AND CHAIRMAN OF QUARTER SESSIONS FOR COUNTY FERMANAGH (1).

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Nov. 29, 30. Dec. 6, 13.

1935. Jan. 23.

Customs—Harbouring cattle unlawfully imported from Irish Free State —Appeal—Jurisdiction—"Criminal Cause or Matter"—Whether Appeal lies from decision of Justices to Court of Quarter Sessions —Fines Act (Ireland), 1851 (14 & 15 Vict., c. 90) section 9—Petty Sessions Act (Ireland), 1851 (14 & 15 Vict., c. 93) section 42—Penalty.

On an information laid by an officer of the Customs and Excise against the prosecutor, J. S., for being knowingly concerned in harbouring certain uncustomed goods, viz., eight cattle imported from the Irish Free State into Northern Ireland, contrary to section 186 of the Customs Consolidation Act, 1876, whereby the prosecutor had forfeited the sum of £204, being treble the duty paid value of the goods, for which the Commissioners of Customs had elected to sue.

The prosecutor was convicted and adjudged for his offence to forfeit and pay the sum of £204 and the order further provided that if the said sum of £204 was not paid within one month the prosecutor should be imprisoned for six months unless he sooner paid the sum of £204.

The prosecutor appealed from the Justices' order to the County Court Judge sitting as Chairman of Quarter Sessions who delivered judgment to the effect that no appeal lay.

A conditional order for a writ of mandamus was granted by the Lord Chief Justice directed to the County Court Judge, sitting as Chairman of Quarter Sessions, commanding him that unless cause be shown to the contrary he do enter continuance and do proceed to hear and determine according to law the appeal from the order of the justices.

Cause having been shown the matter came before the King's Bench Division, consisting of Moore, L.C.J., and Brown, J., who held that the County Court Judge, sitting as Chairman of Quarter Sessions, was wrong in declining jurisdiction, and that he had jurisdiction to hear the appeal. They disallowed the cause shown and made absolute the conditional order for mandamus.

The Commissioners of Customs and Excise appealed to the Court of Appeal.

At the hearing before the Court of Appeal the preliminary point was taken on behalf of J. S. that no appeal lay from the Court of

(1) In the Court of Appeal before Andrews, L.J., Best, L.J., and Megaw, J.

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King's Bench to the Court of Appeal on the ground that this was a criminal cause or matter.

Held, by the Court of Appeal (Andrews and Best, L.JJ., and Megaw, J., *dubitante*) that proceedings taken before the Justices in the name of an officer of Customs are not proceedings in a criminal cause or matter so as to oust the jurisdiction of the Court of Appeal to hear an appeal in respect of them.

Held, also, reversing the King's Bench Division (Moore, L.C.J., and Brown, J.), (Andrews, L.J., dissenting), that the County Court Judge sitting as Chairman of Quarter Sessions was right in holding that no appeal lay to him from the decision of the justices.

APPEAL from an order of the King's Bench Division, consisting of Moore, L.C.J., and Brown, J., making absolute a conditional order for a writ of mandamus directed to the County Court Judge of Fermanagh, sitting as chairman of Quarter Sessions, directing him that he do enter continuance upon and do proceed to hear and determine according to law an appeal from an order of the Justices of Fermanagh.

On 19th March, 1934, Charles F. W. Marshall, an officer of Customs and Excise, laid an information before a Justice of the Peace against John Sherry, the prosecutor in the appeal, that he on 14th March, 1934, was knowingly concerned in harbouring certain uncustomed goods, viz., eight cattle imported from the Irish Free State into Northern Ireland, contrary to section 186 of the Customs Consolidation Act, 1876, whereby John Sherry had forfeited the sum of £204, being treble the duty paid value of the goods, for which the Commissioners of Customs had elected to sue. On the same day a summons for the hearing of the information on 20th March, 1934, was issued and served upon the prosecutor. The sole relief sought in either information or summons was the penalty of treble duty.

The prosecutor was duly convicted and was adjudged for his offence to forfeit and pay the sum of £204. By the order of conviction it was further provided that if the sum of £204 was not paid within one month the prosecutor should be imprisoned for six months unless he sooner paid that sum. There were other convictions obtained upon the same day against the prosecutor for the nominal sums of one shilling and

ten shillings, respectively, upon other informations in connection with the importation of cattle, but these were not the subject of the appeal.

On 23rd March, 1934, the prosecutor gave notice of his intention to appeal from the justices' order to the Quarter Sessions to be held at Enniskillen, on 16th April, 1934, and on 6th April, 1934, he gave the prescribed notice of his intention to prosecute his appeal.

On the hearing of the appeal at Quarter Sessions it was argued on behalf of the Commissioners of Customs that no appeal lay from the order of the justices whilst the contention on behalf of the prosecutor was that such appeal did lie under section 9 of the Fines Act (Ireland), 1851.

The County Court Judge of Fermanagh, sitting as Chairman of Quarter Sessions, having had the case fully argued before him, took time to consider the matter and delivered judgment at the Quarter Sessions held in June, 1934, to the effect that in his opinion no appeal lay.

On the 29th June, 1934, a conditional order for a writ of mandamus was granted by the Lord Chief Justice directed to the County Court Judge of Fermanagh, commanding him that unless cause be shown to the contrary he do enter continuance upon and do proceed to hear and determine according to law the appeal from the order of the Justices.

Cause having been shown, the matter came before the King's Bench Division, consisting of the Lord Chief Justice and Brown, J., who held that the County Court Judge, sitting as Chairman of Quarter Sessions, was wrong in declining jurisdiction, and that he had jurisdiction to hear the appeal. They disallowed the cause shewn and made absolute the conditional order for mandamus.

The Commissioners of Customs and Excise appealed to the Court of Appeal.

When the appeal was about to be opened, the preliminary point was taken on behalf of the prosecutor, that no appeal lay from the decision of the Court of King's Bench to the Court of Appeal on the ground

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that this was a criminal cause or matter. The Court decided to hear arguments on the preliminary point first, and afterwards decided to hear the appeal, reserving all questions which had been raised on the preliminary point.

The Attorney-General (*A. B. Babington, K.C.*), *Begley, K.C.*, and *Maginess*, for the Commissioners of Customs and Excise :—

The present case involves a very substantial question of jurisdiction.

We submit that a prosecution in a customs case is not "a criminal cause or matter." This is substantially a proceeding for the recovery of revenue. The methods used in the present case are for the purpose of enforcing payment of the revenue. The acts which have been committed in the present case are not necessarily unlawful, they are perfectly lawful if done properly. At no time have these cases dealing with customs been regarded as concerned with criminal causes or matters. Customs cases have always been treated on a different footing from cases dealing with rates.

In *The Attorney-General v. Siddon* (1), it was held that where a trader harbours and conceals smuggled goods, he is liable in penalties for the illegal act of a servant, done in the conduct of the business, with a view to protect the smuggled goods, though the master be absent at the time, and the act be done by the servant upon the exigency of the occasion when the goods are discovered.

In that case, Bayley, J., said: "I consider this as "being not properly a criminal proceeding, but a civil "proceeding, for the purpose of recovering that which "is a debt of the Crown. It is a penal proceeding."

In *Ex parte Beeching* (2), it was held, that where a prisoner is brought up under a habeas corpus issued at common law he may controvert the truth of the return by virtue of the 56 Geo. III, c. 100, sections 3 and 4, this not being a criminal matter.

(1) 1 C. & J. 221, 226. (2) 4 B. & C. 137.

In *The Attorney-General v. Bowman* (1), upon the trial of an information against the defendant for keeping false weights, and for offering to corrupt an officer, the defendant's counsel called a witness to character. The evidence being objected to by the Court, it was urged, on behalf of the defendant, that it was admissible as tending to show that the defendant was incapable of the crime imputed to him. Eyre, Ch.B., said: "I cannot admit this evidence in a civil "suit. The offence imputed by the information is "not in the shape of a crime. It would be contrary "to the true line of distinction to admit it, which is "this: that in a direct prosecution for a crime, such "evidence is admissible, but where the prosecution is "not directly for the crime, but for the penalty, as in "this information, it is not."

The Attorney-General v. Radloff (2), was the case of an information for penalties under the Smuggling Acts, 8 & 9 Vict., cc. 86, 87, where the defendant tendered himself as a witness. It was held, by Pollock, C.B., and Parke, B., that he was not a competent witness, because it was a criminal proceeding punishable on summary conviction, within the exception in the 14 & 15 Vict., c. 99, s. 3; but per Platt, B., and Martin, B., that it was not within the exception, and that he was a competent witness.

In *The Attorney-General v. Bradlaugh* (3), Brett, M.R., said: "I agree with the opinion of Martin, B., "in *Attorney-General v. Radloff* (2), that when it is "found that the Attorney-General can either bring "an information in the Exchequer or bring an action "of debt, it is inconsistent with the true view of the "criminal law of England to say, that by proceeding "in one form rather than in the other, he under the "same circumstances, can make in the one case "that a crime which in the other can only be treated "as a debt."

One must look at the nature of the proceedings. Non-payment of the debt does not make proceedings criminal.

(1) 2 Bos. & Pul. 532, n.
(2) 23 L.J. (Ex.) 240.
(3) 14 Q.B.D. 667, 692.

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We rely on the words used by Brett, M.R., in *Attorney-General v. Bradlaugh* (1).

In the case of *Albert Hausmann, Alfred Moser, and Oscar Schmidt* (2), it was held that an information by the Attorney-General in the King's Bench Division for smuggling is not a "criminal information" within section 20 (2) of the Criminal Appeal Act, 1907, and therefore there is no appeal from conviction in such a case to the Court of Criminal Appeal.

In these customs cases the Court is not dealing with essentially criminal matters. In *Albert Hausmann's case* (2), the Lord Chief Justice said in his judgment: "We agree with Brett, M.R., in *Attorney-General v. Bradlaugh* (1), that proceedings on the Revenue side "to recover penalties for smuggling are not criminal "proceedings."

The object of the prosecution of those charged with smuggling offences is not punishment.

The Attorney-General v. Siddon (3), and *Ex parte Beeching* (4), were both cases dealing with smuggling offences. In both, the proceedings were held not to be criminal.

We rely on the decision in the *Attorney-General v. Bradlaugh* (1). The Court must look at the substance of the case. Although in these smuggling cases, the person in default may find himself in gaol that does not make the offence "a criminal cause or matter."

Seaman v. Burley (5) was an altogether different type of case from the present.

There is a distinction between customs cases and other cases. Here we are dealing with the collection of the revenue, and the infliction of imprisonment is ancillary only.

In *The Queen v. Fletcher* (6), Mellish, L.J., carefully guarded himself from saying that his decision applied to all cases. In his judgment he said: "I do not "mean to say that the exception extends to all matters "on the Crown side of the Queen's Bench Division. "There are cases on the Crown side which are really "civil cases."

(1) 14 Q.B.D. 667, 688.
(2) 3 Cr. App. R. 3, 5.
(3) 1 C. & J. 221.
(4) 4 B. & C. 137.
(5) [1896] 2 Q.B. 344.
(6) 2 Q.B.D. 43, 44, 45.

A. L. Smith, L.J., in his judgment in *Seaman v. Burley* (1), was only dealing with one particular class of case, but revenue cases have always been treated as being on a different footing from all other cases."

In *The King v. Hausmann* (2), Alverstone, L.C.J., referred to proceedings by way of information for the recovery of penalties for breaches of the revenue laws. "In these cases there is," he said, "a right of appeal "to the Court of Appeal and to the House of Lords in "certain conditions."

It is clear from the Lord Chief Justice's judgment in *The King v. Hausmann* (2), that when the matter is brought on information in the King's Bench Division, that it is not "a criminal cause or matter." We submit that if it is not a criminal cause or matter when brought in the King's Bench Division, it cannot be a criminal cause or matter when brought before the justices.

On the second branch of the case the question is whether an appeal lies from the order of the justices to the Chairman of Quarter Sessions.

We submit that section 9 of the Fines Act (Ireland), 1851, only deals with appeals against impositions on jurors and other cognate matters. It is contended that this action gives a complete appeal where penalties have been imposed in revenue cases.

The three Acts, the Fines Act (Ireland), 1851, the Summary Jurisdiction Act (Ireland), 1851, and the Petty Sessions Act (Ireland), 1851, were all passed in the same year, and came into force on the same day. It has been suggested that the Fines Act (Ireland), 1851, applies to all penalties. We submit that this Act does not apply to fines levied under the Petty Sessions Acts. We submit that these three Acts are to be read as one code. It was not intended to interfere with the jurisdiction and procedure that was set up at Petty Sessions. The draftsman was merely intending to make the Fines Act comprehensive. We submit that section 3 (3) of the Fines Act was really intended to exclude warrants in cases at Petty Sessions from the provisions of the Act. Petty Sessions cases are merely brought into the Fines Act for purposes of collection.

(1) [1896] 2 Q.B. 344, 350, 351, 352.

(2) 73 J.P. 516.

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The Petty Sessions Act (Ireland), 1851, was by section 42 of that Act prevented from extending to revenue cases.

We submit that section 11 of the Customs and Inland Revenue Act, 1879, gave a special jurisdiction to the justices in customs cases within the Customs code.

Section 5 of the Fines Act deals with the manner in which the penal sums were to be collected. We submit that the appeal for reduction or remission was intended to apply to the officers mentioned in this section.

If section 9 of the Fines Act includes all fines and penalties under the Petty Sessions Act, it would lead to absurdity.

There is already section 24 of the Petty Sessions Act which deals with appeals to Quarter Sessions from the orders made by justices.

It is strange that fines upon jurors should be specially mentioned if the section is comprehensive and includes all fines. It is impossible to read section 9 without realising that there must be some limitation put upon its provisions. That section was dealing with something different from fines imposed at Petty Sessions. We suggest that the construction sought to be put upon section 9 would do the greatest violence to the whole code.

The provisions of the Customs Act are entirely inconsistent with the existence of an appeal to Quarter Sessions under the Fines Act, 1851.

We submit that a construction of section 9 is not reasonable which authorises the Court of Quarter Sessions to mitigate or remit the penalty, provision for doing this being also secured by the powers vested in the Commissioners of Customs and in the Treasury. It would be entirely inconsistent that this power to reduce and remit should be given both to the Commissioners of Customs and to the Chairman of Quarter Sessions. The idea that the Chairman of Quarter Sessions has such power is negatived by the Customs legislation. We submit that there cannot be two authorities possessing such power.

We submit that the County Court Judge sitting as Chairman of Quarter Sessions was right in holding that the Fines Act, 1851, gave no right of appeal to the prosecutor.

We submit that the provisions at the end of section 1 of the Fines Act (Ireland), 1851, shows the trend of succeeding sections as dealing with a small class, viz., officials.

The word " collection " means that a fine has already been imposed by some Court.

We submit that section 9 applies only to the offences enumerated in section 8, with the exception of fines upon jurors, specially introduced into section 9. If the Act is not confined to a small group of officials but is a general Act, then we are faced with the dilemma, what is the necessity for such a limited right of appeal when there exists a general unfettered right of appeal under section 23 of the Summary Jurisdiction Act, 1851.

The revenue and customs are never mentioned in the Fines Act, except in the proviso at the end of section 9.

The decision of the County Court Judge was right and should be affirmed.

[They also referred on the first branch of the argument to *Attorney-General v. Moore* (1).]

McGonigal, K.C., and *W. Johnson* for the prosecutor :

All questions in criminal causes or matters are to be decided in the King's Bench Division ; no appeal lies to the Court of Appeal. We submit that this is " a " criminal cause or matter."

We rely on *The Queen v. Fletcher* (2). Criminal causes or matters are exclusively given to the King's Bench Division. We also rely on *The Queen v. Steel* (3).

In *Ex parte Alice Woodhall* (4), the Queen's Bench Division having refused an application for a writ of habeas corpus made on behalf of a person who had been committeed to prison under section 10 of the

(1) 3 Ex. D. 276.
(2) 2 Q.B.D. 43.
(3) 2 Q.B.D. 37.
(4) 20 Q.B.D. 832, 835.

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Extradition Act, 1870, as a fugitive criminal accused of extradition crime, it was held that the decision of the Queen's Bench Division was given in a "criminal "cause or matter" within the meaning of section 47 of the Judicature Act, 1873, and therefore no appeal would lie to the Court of Appeal.

In his judgment, Lord Esher, M.R., said, "The "result of all the decided cases is to show that the "words 'criminal cause or matter' in section 47 should "receive the widest possible interpretation. The in- "tention was that no appeal should lie in any criminal "matter in the widest sense of the term. This Court "(the Court of Appeal) being constituted for the "hearing of appeals in civil causes and matters. . . ."

We also rely on the words used by Viscount Cave in *Clifford and O'Sullivan* (1), in his speech in the House of Lords, when he said: "It has been held that the "words judgment of the High Court in any criminal "cause or matter should be construed in a wide sense "and as including any judicial decision with regard "to proceedings the subject matter of which is "criminal."

We strongly rely on *Seaman v. Burley* (2). In that case it was held by the Court of Appeal that a judgment upon a special case stated by justices on an application to enforce payment of a poor rate by warrant of distress is a judgment in a criminal cause or matter within section 47 of the Judicature Act, 1873, inasmuch as the proceedings before the justices may end in imprisonment of the person in default; and therefore an appeal will not lie to the Court of Appeal from the judgment of the Queen's Bench Division on such a case.

In that case Lord Esher, M.R., said: "It has been "held in those cases, as it appears to me, that when "the proceeding is before magistrates, and it is one "which may end in imprisonment, it must be con- "sidered to be a criminal proceeding within section 47 "of the Judicature Act, 1873, and therefore one in "which there can be no appeal to this Court."

(1) [1921] 2 A.C. 570, 579, 580.

(2) [1896] 2 Q.B. 344, 347, 348, 350, 351, 352.

Lord Esher also said : " If it is before justices and " may end in imprisonment, the cases have held that " it is criminal within section 47 of the Judicature " Act, 1873."

In the same case, Kay, L.J., said : " I think we are " bound by the decisions on that point to hold that, " though it does not necessarily follow that there will " be a commitment to prison, yet, if the proceedings " before magistrates may have that result, that is " enough to show that the proceeding is in the nature " of a criminal proceeding in which there is no appeal " to this Court."

A. L. Smith, L.J., in his judgment in the same case used words to the same effect.

The grounds of the decision in *Robson v. Biggar* (1) were that the proceeding was a criminal one ; " it might " end in imprisonment, and in certain circumstances " would so end."

We rely on *ex parte Schofield* (2), a case where the Queen's Bench Division having refused to grant an order nisi for a mandamus to compel a stipendiary magistrate, who had made an order under section 96 of the Public Health Act, 1875, for the abatement of a nuisance, to state a case for the opinion of the Court, the applicant moved, *ex parte*, by way of appeal from the Queen's Bench Division for an order nisi in the Court of Appeal, it was held by the Court of Appeal that the decision of the Queen's Bench Division was given in a " criminal cause or matter " within the meaning of section 47 of the Judicature Act, 1873, and therefore that the Court of Appeal had no jurisdiction to entertain the application for a mandamus.

We also rely upon the Irish case of *ex parte Brosnan* (3).

In *Mellor v. Denham* (4), and in *Reg. v. Whitchurch* (5), proceedings to recover penalties were treated as criminal proceedings. Both these cases were decided in the Court of Appeal.

We also rely on *Burnett v. Berry* (6), also decided in the Court of Appeal.

(1) [1908] 1 K.B. 672.
(2) [1891] 2 Q.B. 428.
(3) 22 L.R.I. 334.
(4) 5 Q.B.D. 467.
(5) 7 Q.B.D. 534.
(6) 12 T.L.R. 464.

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The infliction of a fine of treble the duty paid value of the goods is a punishment not a debt. The Crown have chosen to adopt criminal proceedings before the magistrates.

The case of *Attorney-General v. Bradlaugh* (1) is distinguishable from the present case.

The Attorney-General v. Siddon (2) does not help the Crown. *The Attorney-General v. Radloff* (3) is not of much assistance to the Crown, the result in that case may be described as a drawn battle. The observations of the Lord Chief Justice in *Hausmann's case* (4) were confined to proceedings on the revenue side.

No attempt has been made on behalf of the Crown to deal with the case of *Clifford and O'Sullivan* (5), decided in the House of Lords.

The fact that section 11 of the Customs Act, 1879, provides that penalties may be sued for by action of debt, does not conclude the matter. That provision merely deals with procedure.

We submit that this Court cannot entertain the appeal.

On the second branch of the argument we contend that the Fines Act (Ireland), 1851, is not limited and confined, as has been suggested by the Crown.

These three Acts, the Fines Act (Ireland), 1851, the Summary Jurisdiction (Ireland) Act, 1851, and the Petty Sessions (Ireland) Act, 1851, are distinct Acts. They are not to be read together, they are not embodied in one another. This Fines Act is merely substituted for a previous Fines Act.

We submit that there is little weight in the argument that the construction of a general right of appeal would lead to anomalies. There could be no more striking anomaly than the existence of an appeal from Petty Sessions to Quarter Sessions in England and no such appeal in Ireland. We know of no reason why there should be an appeal in England and none in Ireland. If the argument of the Crown is to prevail, then the

(1) 14 Q.B.D. 667.
(2) 1 C. & J. 221.
(3) 23 L.J. Ex. 240.
(4) 3 Cr. App. R. 3.
(5) [1921] 2 A.C. 570.

decision of a single justice is to be final and binding. In England the justices have power to remit the fine of treble value.

By section 4 of the Summary Jurisdiction Act, 1879, which does not apply to Ireland, power is given to Courts of Summary Jurisdiction to mitigate punishment.

There is no limit of any sort appearing in the title and preamble to the Fines Act (Ireland), 1851.

Customs penalties do not differ in any way from other penalties.

Section 8 of the Fines Act (Ireland), 1851, shows that section 9 is not limited in the way contended for by the Crown.

Section 9 gives an appeal from justices, and from the High Court, and from Quarter Sessions.

We rely on the preamble as showing that the Act is of general application.

We rely on the words used by Palles, C.B., in *Rex (Carroll) v. The Justices of the Peace for the County of Westmeath* (1), where he said, "the Fines Act, 14 & 15 "Vict., c. 90, deals with the case of any penal sum due "to the Crown." It is obvious that the Chief Baron looked on the provisions in the Fines Act (Ireland), 1851, as of general application.

We rely on *The King (County Council of Dublin) v. Keating* (2), where the King's Bench Division and the Court of Appeal held that a fine imposed for an offence against the Irish Education Act, 1892, came within the Fines Act (Ireland), 1851.

We submit both on the authority of the decided cases, and on reading the sections of the Fines Act (Ireland), 1851, that this Act is perfectly general and applies to all penalties and fines.

Section 34 of the Fines and Penalties Act (Ireland), 1843, excluded from its operation all fines, penalties, or forfeitures, imposed under any Acts relating to the revenues of customs.

We rely strongly on the fact that this section is not to be found in the Fines Act (Ireland), 1851, as establishing the application of the Act to all fines and penalties.

(1) 45 I.L.T.R. 242, 244. (2) [1908] 2 I.R. 375.

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No special procedure was marked out for fines imposed for offences under the Irish Education Act, 1892.

We submit that it is impossible to read section 42 of the Petty Sessions (Ireland) Act, 1851, into the Fines Act (Ireland), 1851. This provision must have been deliberately taken out of this latter Act. It is difficult to understand what would be the object of taking this provision out of one Act and putting it into another Act.

We submit that section 42 merely preserves the procedure of the Petty Sessions (Ireland) Act, 1851, as applicable to all offences under the Customs Acts.

We rely on the words in section 9 of the Fines Act (Ireland), 1851, that "such appeal, *when made* against "any order by the said divisional justices or by any "other justice upon summary conviction, shall be "subject in all respects to the provisions of the said "Petty Sessions Act."

There was a limited right of appeal contained in the Fines and Penalties (Ireland) Act, 1843. Section 9 of the Act of 1851 makes that right perfectly general. The draftsman of the Act of 1851 must have had section 11 of the Act of 1843 before him, and must have drafted section 9 deliberately.

Cassidy v. Moore (1) demonstrates that the Fines Act (Ireland), 1851, applies to all fines.

A remission of the fine might well involve a practical acquittal.

We submit that there is nothing extraordinary in the Chairman of Quarter Sessions having power to remit or reduce a fine.

The Commissioners of Customs and Excise have only power to reduce or remit a fine after the case has been dealt with by a competent Court. In England the justices have had this power to reduce or remit for more than fifty years. Co-existing with the power of the Commissioners of Customs and Excise to remit, the justices have power to remit. If there can co-exist at the same time, the power of the justices to remit, and the power of the Commissioners of Customs and

(1) I.R. 10 C.L. 216.

Excise to remit, there is nothing extraordinary in the Chairman of Quarter Sessions having such power.

Cassidy v. Moore (1) shows how wide the Fines Act, 1851, is. It was followed in *Stevenson v. O'Neill* (2). In *Coulter v. Martin* (3), *Cassidy v. Moore* (1) and *Stevenson v. O'Neill* (2) were followed.

We submit that the concurrent right exists in the Court of Quarter Sessions to reduce or remit the penalty.

Our argument rests on the following three propositions : (*a*) the sum ordered to be paid by the prosecutor is a penalty ; (*b*) the expression " such penal sum as " aforesaid " when used in section 9 of the Fines Act (Ireland), 1851, applies to all penalties ; (*c*) the statement which appears in section 9 of the Fines Act, 1851, that " such appeal when made against any order by " the said divisional justices or by any other justice " upon summary conviction, shall be subject in all " respects to the provisions of the said Petty Sessions " Act," does not exclude customs cases from the ambit of section 9. The first proposition can scarcely be controverted. The word " penalty " is actually used in the body of section 232 of the Customs Consolidation Act, 1876. There are numerous other sections in the Customs Acts, where the word penalty is used in the same sense.

As to the second proposition, the Fines Act, 1851, was not a new type of Act. The title of the Act of 1843 is almost the same as that of the Act of 1851.

We submit that it cannot be contended that the Act of 1851 is less wide in its application than that of the Act of 1843.

Leaving out the word " all " (which is used in the Act of 1843) from the title and preamble of the Act of 1851, would be a strange method of enacting that the Act did not apply to offences under the Customs Acts. If as is argued on behalf of the Crown, the application of the Act is limited, to what particular type of fines, is it limited ?

We submit as a general proposition of law that a word is to be considered as used throughout a statute

(1) I.R. 10 C.L. 216.
(2) I.R. 11 C.L. 134.
(3) I.R. 11 C.L. 477.

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in the same sense. In *In re National Savings Bank Association* (1), Turner, L.J., said in his judgment: "I do not consider that it would be at all consistent "with the law, or with the course of this Court, to "put a different construction upon the same word in "different parts of an Act of Parliament, without "finding some very clear reason for doing so."

We submit that the words "any such penal sum as "aforesaid" must have the same interpretation throughout the Act. These words must refer to all penalties which may be imposed by any Court. There is nothing in the Act specifically cutting down the meaning of these words.

The right of appeal as given in the opening words of section 9 is not taken away by subsequent words in the section.

The reference to the Petty Sessions Act is merely for the purpose of preserving the forms of procedure in customs cases.

The use of the word "but" in section 9 is to show that the Petty Sessions Act is merely to govern the procedure to be followed. The word "but" shows the meaning of the reference to the Petty Sessions Act, 1851.

[On the first branch of the argument they also referred to *Rex v.* "*J.*" (2), *ex parte Beeching* (3), and *The Attorney-General v. Bowman* (4).]

The Attorney-General in reply:—

The word "but" was used in section 9 of the Fines Act (Ireland), 1851, merely as a disjunctive. Jurisdiction is imported and not merely procedure. The statute was dealing not with matters of procedure but with matters of jurisdiction.

We rely on *Rex v. Otto Monsted, Ltd.* (5), where it was held that section 25 of the Sale of Foods and Drugs Act, 1899, which provides that, unless the context

(1) L.R. 1 Ch. A.C. 547, 549, 550.
(2) [1933] N.I. 73.
(3) 4 B. & C. 137.
(4) 2 Bos. & Pul. 532, n.
(5) [1906] 2 K.B. 456, 463, 464.

otherwise requires, "an offence under this Act shall be "treated as an offence under those Acts" (*i.e.*, the Sale of Food and Drugs Acts), does not confer the right of appeal to a Court of Quarter Sessions from a conviction by a Court of Summary Jurisdiction, under section 1 of the Act of 1899, of the offence of importing into the United Kingdom margarine in packages not conspicuously marked. We rely on the words used by Darling, J., at pages 463, 464.

The Fines Act, 1851, and the Petty Sessions Act, 1851, are to be read together, and the exclusion in section 42 of the Petty Sessions Act, applies to the Fines Act.

The omission of the word "all" from the Fines Act, 1851, is significant.

The two Acts are interwoven. The Legislature clearly intended to preserve all the provisions of the Petty Sessions Act, 1851, and to read them into the Fines Act, 1851.

Among the sections intended to be preserved was the exclusion section, section 42 of the Petty Sessions Act, 1851.

This Fines Act is a general Act for the collection and application of fines, except where excluded by the purview of the Acts.

We submit that the cases referred to on behalf of the prosecutor on this branch of the argument are of little assistance.

The words "such penal sum as aforesaid" must be confined to fines imposed on "officers" under the statute.

We submit upon the whole case that customs offences are excluded from the operation of section 9 of the Fines Act, 1851. It would be an anomaly if such an appeal existed in Ireland but not in England.

We submit there is no appeal to the Chairman of Quarter Sessions. *Cur. adv. vult.*

ANDREWS, L.J.
Jan. 23.

ANDREWS, L.J.: On 19th March, 1934, Charles F. W. Marshall, an officer of Customs and Excise, laid an information before a Justice of the Peace against one John Sherry that he on 14th March, 1934, was know-

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ingly concerned in harbouring certain uncustomed goods, to wit, eight cattle, imported from the Irish Free State into Northern Ireland, contrary to section 186 of the Customs Consolidation Act, 1876, whereby the said John Sherry had forfeited the sum of £204, being treble the duty paid value of the goods, for which the Commissioners of Customs had elected to sue. On the same day a summons for the hearing of the said information on 20th March, 1934, was issued and served upon Sherry. The sole relief sought in either information or summons was the penalty of treble duty. Sherry was duly "convicted" and was adjudged for his said "offence" to forfeit and pay the said sum of £204. By the order of conviction it was further provided that if the said sum of £204 was not paid within one month Sherry should be imprisoned for six months, unless he sooner paid the said sum of £204. We are not concerned in the present appeal with other convictions obtained upon the same day against Sherry for the nominal sums of one shilling and ten shillings, respectively, upon other informations in connection with the importation of the said cattle, and I shall make no further reference to them.

On 23rd March Sherry gave notice of his intention to appeal from the Justices' order to the Quarter Sessions to be held at Enniskillen on 16th April, and on 6th April he gave the prescribed notice of his intention to prosecute his appeal.

On the hearing of the appeal before the Chairman and Justices it was argued on behalf of the Commissioners that no appeal lay from the order of the Justices in the matter, whilst the contention on behalf of the defendant Sherry was that such appeal did lie under section 9 of the Fines Act (Ireland), 1851. The learned County Court Judge after argument reserved judgment, which he delivered in favour of the Commissioners on 18th June, when he made an order in the following terms:—"Strike out. No jurisdiction."

On 29th June the defendant Sherry applied for and obtained from the Lord Chief Justice a conditional order that a writ of mandamus should issue directed to the said County Court Judge commanding him that

he do enter continuance upon and proceed to hear and determine (*inter alia*) the said appeal; and on 25th October the Lord Chief Justice and Brown, J., sitting as a Divisional Court, made absolute the said conditional order in so far as it related to the hearing of the said appeal, and ordered the said Commissioners to pay the prosecutor (Sherry's) costs. It is from this decision that the present appeal was brought to this Court.

When the learned Attorney-General was about to open the appeal on behalf of the said Commissioners, the preliminary point was taken by Mr. McGonigal, who appeared for Sherry, that no appeal lay from the decision of the Court of King's Bench to the Court of Appeal on the ground that this was a criminal cause or matter. We decided to hear the arguments upon this preliminary point first; and, having done so, we intimated to counsel that, as the matter would require careful consideration, we would proceed to hear the appeal, reserving for the time being all questions which had been raised on the preliminary point. This course we thought best in the interests of expedition and the saving of costs. Thereupon, the arguments proceeded upon the soundness of the order of the Court of King's Bench, and this judgment expresses my conclusions on both questions.

The jurisdiction of this Court under section 24 of the Judicature Act (Ireland), 1877, is to hear and determine appeals from any judgment or order, save as thereinafter mentioned, of the High Court of Justice. By section 50 jurisdiction in relation to questions of law arising in criminal cases was vested in the judges of the High Court of Justice as therein mentioned; and the determination of any such question by the said judges was made final and without appeal. By the said section it was further provided that no appeal should lie from any judgment of the said High Court in any criminal cause or matter save for some error of law apparent upon the record (in respect of which a right of appeal was expressly conferred by sub-section 23 (4) of the Act) as to which no question should have been reserved for the consideration of the Judges under 11 & 12 Vict., c. 78.

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Upon these provisions of the Judicature Act the issue to be determined on the question of our jurisdiction to hear this appeal is simply whether this is or is not a "criminal cause or matter"; and the question remains the same notwithstanding the repeal of section 50 of the Judicature Act by section 21 (4) of the Criminal Appeal (Northern Ireland) Act, 1930, for the same words are to be found in section 18 of that Act, which abolished writs of error and the powers and practice existing in respect of motions for new trials in criminal cases, and enacted that the Crown Cases Act, 1848 (11 & 12 Vict., c. 78) should cease to have effect. It further enacted that, except as provided by that Act, no appeal should lie from any judgment of the High Court in "any criminal cause "or matter."

It must be admitted that considerable divergence of judicial opinion has arisen as to the true meaning of the words "criminal cause or matter," and as to the various forms of judicial proceedings which properly fall within them.

Mr. McGonigal relied upon such cases as *The Queen v. Fletcher* (1), in which it was held that an order discharging a rule for a certiorari to bring up and quash a summary conviction of magistrates was held to be a judgment in a criminal matter and therefore not appealable. In my opinion the decision of the Court in that case is unquestionably sound—that section 47 of the English Judicature Act (corresponding to section 50 of the Irish Act) extends to a proceeding in the Queen's Bench Division, which might be said not to be strictly a criminal proceeding in that Court, but was a proceeding taken in that Court for the purpose of quashing a conviction before justices which was clearly a criminal proceeding. If it is a criminal cause or matter it is immaterial that it had not its inception in the High Court. But one must be careful not to over-generalize from such cases. In *Fletcher's* case (1), the charge was for trespass in pursuit of game, and the conviction was for 1/– penalty and costs or seven days' imprisonment. It was not questioned that the

(1) 2 Q.B.D. 43.

proceedings before the magistrates were of a criminal character. The conviction was for "an offence under "the criminal law." Mellish, L.J., in holding that the words of section 47 prohibiting an appeal from a judgment in a criminal cause or matter were intended to refer to all criminal matters whatever coming before the High Court (*i.e.*, to all criminal matters on the Crown side of the Queen's Bench), was careful to point out that this did not mean to all matters on the Crown side of the Queen's Bench Division, for there were cases on the Crown side which were really civil cases.

In my opinion the case is useful as containing a clear enunciation of principle, but it in no sense determines the point with which we are really concerned in this case—whether this charge under the Customs Act was a criminal cause or matter.

Mr. McGonigal also strongly relied upon the words of Lord Esher, M.R., in *ex parte Alice Woodhall* (1), that the result of all the decided cases is to show that the words "criminal cause or matter" in section 47 should receive the widest possible interpretation. In that case the Queen's Bench Division held that an application for a writ of habeas corpus made on behalf of a person who had been committed to prison under section 10 of the Extradition Act, 1870, as a fugitive criminal accused of an extradition crime was made in a criminal cause or matter—a conclusion which does not appear to me to require any particularly wide interpretation to be given to the words. Such a case does not assist me in determining the present.

The strongest case in Mr. M'Gonigal's favour is undoubtedly *Seaman v. Burley* (2), in which it was held by the Court of Appeal that a judgment upon a special case stated by justices on an application to enforce payment of a poor rate by warrant of distress is a judgment in a criminal cause or matter within section 47 of the Judicature Act, 1873, inasmuch as the proceedings before the justices may end in imprisonment of the person in default; and, therefore, an appeal will not lie to the Court of Appeal from the judgment of the Queen's Bench Division in such a

(1) 20 Q.B.D. 832, 835. (2) [1896] 2 Q.B. 344.

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case. There is no doubt that the judgments in that case contain many passages from which, if properly applicable to the present case, one might naturally conclude that this is a criminal cause or matter. In both cases the proceeding is one which might, (not which must) end in imprisonment. In both cases proceedings were initiated before the magistrates at petty sessions. I do not suggest that the authority of that case is in any degree shaken by *The Southwark and Vauxhall Water Co. v. Hampton Urban District Council* (1), in which it was held that an application to a court of summary jurisdiction for an order to enforce payment of a general district rate under the Public Health Act, 1875, section 256, was not a criminal cause or matter; but this latter case shows that the application of the principles enunciated in the former must be limited, and that it is of vital importance to consider in each case if the proceeding is one for the recovery of a sum which is declared to be a civil debt recoverable summarily, in which case it is not, properly speaking, a criminal cause or matter.

This naturally brings me to a consideration of the provisions of the statutes under which the penalty sued for is created and made recoverable. Any person who harbours uncustomed goods is by section 186 of The Customs Laws Consolidation Act, 1876, liable for each such "offence" to forfeit either treble the value of the goods or one hundred pounds at the election of the Commissioners of Customs, and the offender may either be detained or proceeded against by summons. This penalty of the treble value of the goods was made recoverable by section 218 of the Act, which is now replaced by section 11 of The Customs Act, 1879. Under this latter section all penalties . . . may be sued for, prosecuted, determined and recovered by action, information, or other appropriate proceeding in the High Court of Justice in England, or by *action of debt*, information, or other appropriate proceeding in the superior Courts of common law at Dublin in the name of the Attorney-General, or by information in the name of some officer of Customs or

(1) [1899] 1 Q.B. 273.

Excise before one or more justices. By section 232 of the Act of 1876 if any penalty be not paid on conviction the convicting justice is empowered to commit the offender to gaol, there to remain for such term as is thereinafter provided or until the penalty shall be paid.

Now in my opinion the words of section 11, which make the penalty recoverable (amongst other means) by action of debt, clearly indicate that its character is in the nature of a civil liability, and that it is, accordingly, recoverable by civil procedure. I am further of opinion that it would be unreasonable to treat the penalty as being of a civil character when sued for by action and as of a criminal character when proceeded for by information either in the High Court or before the justices. No doubt Lord Esher in *Seaman v. Burley* (1), when laying stress upon the importance of procedure, indicated that an assault may be made the subject of civil procedure by action, in which case an appeal lies to the Court of Appeal, or it may be made the subject of criminal procedure as by indictment, in which case there could be no such appeal ; but this point is answered so far as the present case is concerned by the observations of Brett, M.R., in *Attorney-General v. Bradlaugh* (2), where he points out that the real difference in such a case is that, whilst the Crown indict for the assault as an injury done to the public and seek the punishment of the accused, a plaintiff does not sue for the assault but for injury done to him by the assault. In my opinion, therefore, Lord Esher's opinion as to the importance of procedure, whilst unquestionably correct and properly applied in a case such as assault or libel, has no application to the present case, in which, whatever be the Court or the procedure determined upon, the relief sought, namely, the penalty, is the same. In my opinion it would be an absurd conclusion at which to arrive, and one which, I conceive, would be at variance with the true view of our law, that when a person is charged with an offence under the Customs Acts the character of the proceedings, with all that it involves, should be determined by the forum arbitrarily selected either

(1) [1896] 2 Q.B. 344, 346. (2) 14 Q.B.D. 667, 691.

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by the Attorney-General or by a Customs official. It would be doubly absurd if the smaller offences, which would naturally be brought before the justices, were branded as criminal, whilst the more serious cases tried in the High Court were regarded as of a purely civil character.

Now, apart from principle, there is in my opinion ample authority in these smuggling cases in support of the civil character of the proceedings. No doubt in the *Attorney-General v. Radloff* (1), the Court was equally divided, Martin and Platt, B.B., holding that the information filed by the Attorney-General for the recovery of penalties for a breach of the Customs Laws was not a criminal proceeding, whilst Park, B., and Pollock, C.B., considered that it was. The scales were, however, weighed down in support of the former view by the judgment of Brett, M.R., in *Attorney-General v. Bradlaugh* (2), who says in unqualified terms that if he had been a member of the Court at the time that *Radloff's case* (1) was decided, he would have seen no answer to the reasoning of Martin, B., and he would have been of opinion that an information for a penalty on the revenue side of the Court of Exchequer could not at any time, unless there were special and clear words in an Act of Parliament saying it was so, be considered as a criminal proceeding. He refers to an Act of Parliament passed subsequently to *Radloff's case* (1), applying to a suit or information for penalties on the revenue side of the Court of Exchequer trial rules applicable to a civil trial and which are not applicable to a criminal character, and he regards this as an act of the Legislature deciding the controversy in favour of the judges who upheld the civil character of the proceedings. The learned Master of the Rolls also examined the speeches of the Law Lords in *Bradlaugh v. Clarke* (3), and said that to him it seemed that they were all of opinion that the proper procedure in that case was an information on the revenue side of the Court of Exchequer, or that which is equivalent to it now, and that it was not a criminal

(1) 10 Ex. 84.
(2) 14 Q.B.D. 667, 688, 690.
(3) 8 A.C. 354.

proceeding, but an action for penalties, or that which is equivalent to an action for penalties, namely, an information for penalties, a civil proceeding on the revenue side of the Court of Exchequer.

Finally, there is the important decision upon the point by the Court of Criminal Appeal in the case of *Rex v. Hausmann and Others* (1). The appellants were found guilty by a special jury of smuggling saccharin upon an information by the Attorney-General and were adjudged under section 186 of the Customs Laws Consolidation Act, 1876, to pay a penalty of treble duty. During the argument the Lord Chief Justice said that it was never suggested, while he was Attorney-General, that the issue of a writ of attachment against smugglers was a criminal proceeding ; and in giving judgment he said that the Court were of opinion that the information to recover penalties for smuggling was not a criminal proceeding, and that, accordingly, the Court of Criminal Appeal had no jurisdiction to entertain the appeal from the sentence. He then expressly approved of the view expressed by Brett, M.R., in *Attorney-General v. Bradlaugh* (2), and added :—" It almost concludes the " matter that there is an appeal in this class of case to " the Court of Appeal."

There is, accordingly, ample authority that proceedings in these smuggling cases, when instituted in the High Court by information at the suit of the Attorney-General for the recovery of penalties, are civil, not criminal, in character ; and for the reasons already mentioned I am of opinion that the character of proceedings instituted before the justices by information at the suit of an officer of Customs for the recovery of the same penalties must be civil also. These smuggling cases stand in a different category from *Seaman v. Burley* (3), by reason of the special Customs legislation to which I have referred. These Statutes constitute the penalties imposed for the offence of harbouring charged in the present case a debt, which the poor rate in *Seaman v. Burley* (3) was expressly held not to be ; and in my opinion, on the

(1) 3 Cr. App. R.3.
(2) 14 Q.B.D. 667, 688.
(3) [1896] 2 Q.B. 344.

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true construction of sections 186, 220, 232 and 236 of the Act of 1876, and of section 12 of the Act of 1879 (which replaces section 237 of the Act of 1876), they empower the Court in the case of such an offence to impose a term of imprisonment, not as punishment, but merely as a step in aid of the recovery of the statutory penalties which constitute the real punishment. The legal effect of such a provision as to imprisonment was clearly indicated by Lord Shand in *Derby Corporation v. Derbyshire County Council* (1), where he said :—"The fact that disobedience to an "order brings with it a liability to a penalty does not "in my opinion make the original proceeding one of a "penal nature any more than imprisonment to enforce "obedience to an order in a civil proceeding would "make that proceeding one of a criminal character."

For these reasons I am of opinion that Mr. McGonigal's preliminary point as to our jurisdiction to hear the appeal fails.

The preliminary point being thus disposed of, it becomes necessary to consider whether the Divisional Court were right in holding that an appeal lay from the decision of the justices to the Court of Quarter Sessions, and in directing the County Court Judge of Fermanagh that he should proceed to hear and determine the appeal. After careful consideration of all the relevant statutes and authorities I have come to the conclusion, which, I regret to say, differs from that of my colleagues, that the decision appealed from is correct.

Jurisdiction to bring the appeal to Quarter Sessions is claimed under section 9 of the Fines Act (Ireland), 1851, and is expressly disclaimed under section 23 of the Summary Jurisdiction (Ireland) Act, 1851, or section 24 of the Petty Sessions (Ireland) Act, 1851. The appeal section under the Summary Jurisdiction Act cannot be relied upon, as under it appeals are only permitted where the order against which it is desired to appeal has been made under the provisions of that Act, whereas the order in the present case was made under the Customs Act. So also the appeal section

(1) [1897] A.C. 550, 554.

under the Petty Sessions Act cannot be availed of, because by section 42 it is provided that the Act shall not extend to proceedings under (amongst others) the Customs Acts.

Before passing to the provisions of these three Acts of Parliament, all of which received the Royal Assent on the same day, it is necessary to consider some of the earlier legislation in order to form a clear conception as to how the law stood immediately before these Acts were passed.

Under the Fines and Recognizances (Ireland) Act, 1838, which was expressly made applicable to all fines, jurisdiction was conferred (by section 8) to apply for reduction or remission of a fine to a Court of Quarter Sessions. The Act contains no words expressly excluding Customs cases, which, accordingly, were presumably included. This Act was repealed by the Fines and Penalties (Ireland) Act, 1843, which was also expressly made applicable to all fines. In this Act (by section 10) a similar right of appeal to Quarter Sessions was granted, limited, as in the earlier Act, to the reduction or remitting of the fine. Section 34 of the Act, however, provided that the Act should not extend to Revenue, including, of course, Customs Fines. This Act in turn was repealed by the Fines Act, 1851. This latter Act is entitled : "An Act for "the better collection of Fines, Penalties, Issues, "Amerciaments, and forfeited Recognizances in "Ireland." Similar words are to be found in the preamble. It is true that the word "all" does not precede the word "Fines" as in the preambles of the earlier Statutes ; but I attach no significance to this omission as no "fines" are expressly excluded, and the first section of the Act refers to "*all* such Penal "Sums as aforesaid." Indeed, these words are to be found in several sections of the Act. Several references are made in the Act to the Petty Sessions Act, 1851, which, though in fact three chapters later, became law on the same day. The Act makes provision for officers to enter and account for fines, for the issuing and addressing of warrants, and for the collection and accounts of fines ; and section 8 empowers justices to

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impose penalties for non-observance of the provisions of the Act. Next follows the important appeal section, with the scope and application of which we are really solely directly concerned in the present case. It enacts, so far as is material, that it shall be lawful for any person against whom any order shall be made for payment of any such penal sum as aforesaid by any such Court or officer as aforesaid, exceeding the sum of forty shillings, and in cases of fines upon jurors whatever the amount may be, to appeal for the reduction or remission thereof in certain cases by Petition to the Court of Assizes, or to one of the superior Courts of Law in Dublin, or to the next Quarter Sessions where the order shall be made by any justice or justices in any Petty Sessions District; and such appeal when made against any order by the said Divisional justices or by any other justice upon summary conviction shall be subject in all respects to the provisions of the said Petty Sessions Act, but in every other case it shall be made by petition subject to certain provisions therein mentioned. The section concludes with a proviso that nothing therein contained should be deemed in any way to limit or restrain the Lord Lieutenant or the Lords Commissioners of Her Majesty's Treasury or the Commissioners of Inland Revenue from reducing or remitting any fine or sum imposed or ordered to be levied which by law he or they may be in any way authorised to reduce or remit. The Act contains no clause, such as section 34 of the Act of 1843, excluding customs fines from its operation.

The net result of this Fines Act legislation, so far as is material to the present case, accordingly, is that it contains a right of appeal from the decision of the justices which is limited to the reduction or remittal of a fine or penalty. Originally applicable to all fines and penalties, it was subsequently restricted so as not to extend to fines imposed under the Customs Acts. By the Act of 1851 this restrictive section disappeared; and the application of the Act to all fines and penalties was once again at least *primâ facie* established.

The answer to this argument on behalf of the Attorney-General is that this restrictive or exclusion

section in the Fines Act of 1843 has been merely transferred to the Petty Sessions Act, 1851, section 42 of which provides that "Nothing in this Act shall "extend or be construed to extend to any Information "or complaint or other proceeding under or by virtue "of any of the Acts relating to Her Majesty's Revenue "of . . . customs . . ., except that all proceedings "as to the same may be in the forms of procedure "required by this Act or as near thereto as the circum- "stances of the case will admit." It is further contended that all the three Acts of 1851—the Fines, Summary Jurisdiction and Petty Sessions Acts—must be read together, and that accordingly this exclusion section of the Petty Sessions Act must be read, as it were, into the Fines Act. Even if there were nothing more to be said than that which I have stated, I would find it impossible as a matter of statutory interpretation to read into an Act a provision which must be assumed to have been deliberately taken out of or excluded from it and introduced into another Act, even though both Acts were passed upon the same day; but there are other important considerations which in my opinion increase greatly in the present case the difficulty of any such system of legal construction. The first of these is that this section 42 was not, as is alleged, merely a section transferred from the Fines Act code to the Petty Sessions code, for in all material respects it was already to be found in that code, namely, in section 34 of the Summary Convictions (Ireland) Act, 1849—an Act which remained in force until it was repealed by section 43 of the Petty Sessions Act, 1851. Accordingly, in determining whether section 42 of the Petty Sessions Act, 1851, should be read into the Fines Act it is necessary to bear in mind that it is not merely a provision transferred from an Act in one code to another Act passed upon the same day in another analogous code; but that it is a provision which was to be found prior to 1851 in both codes, and which, when omitted, must in the circumstances be presumed to have been deliberately omitted by the legislation of that year from one of the codes. No explanation has been offered, nor

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can I conceive any for myself, as to why, if the Attorney-General's contention be correct, this exclusion section was omitted from the Fines Act, and why one is left to read into that Act a section of another Act which is not expressly incorporated with it or referred to in it.

A further difficulty which confronts one in reading section 42 of the Petty Sessions Act into the Fines Act is the limitation placed upon its operation by the opening words of the section, which are that : " Nothing " in this Act shall extend, etc." These words are most specific, and I am quite unable to read them as extending to another Act which is not mentioned in the section.

I am not concerned with the policy or wisdom of the Legislature which effected this result. My duty is only to interpret the statutes according to the ordinary and natural meaning of the language employed. In the words of Lord Russell in *The Queen v. Titterton* (1), " The duty of the Court when called upon to construe " an Act of Parliament is, I conceive, to read the Act " itself, and, if its language is clear, to give effect to " what the legislature has said. It is to my mind " proper to refer to earlier Acts in *pari materia* only " where there is ambiguity." In my opinion, whether we have regard in the present case to the provisions of the Fines Act, 1851, alone, or in addition to the earlier and contemporaneous legislation, the result is the same—no words are to be found which exclude a person convicted and fined for an offence against the customs laws from the benefit of the appeal section of that Act. The learned Attorney-General himself admitted in the course of his argument that the words " any such penal sum as aforesaid," in section 9 are the same as those used in section 3, which were " ad- " mittedly of universal application."

I am further of opinion that the weight of authority is also wholly in favour of the general application of the provisions of the Fines Act to all fines and penalties. Such was obviously the view of Lord O'Brien, L.C.J., in *The King (Co. Council of Dublin) v. Keating* (2), in which case the King's Bench Division and Court of

(1) [1895] 2 Q.B. 61, 67.

(2) [1908] 2 I.R. 375, 377, 378.

Appeal held that a fine imposed for an offence against the Irish Education Act, 1892, came within the Fines Act, 1851. More directly in point, however, is the opinion of the learned author of *O'Connor's Justice of the Peace* (1911 edition), which, as I read it, is entirely in harmony with the view which I have expressed. He deals in Chapter 5 of that standard work with summary cases which come within the Petty Sessions Act, and in Chapter 6 with summary cases which are not within that Act. These latter are the cases, including Customs cases, referred to in section 42 of the Petty Sessions Act. In dealing with these cases he refers (at p. 78) to the Fines Acts in the following words :—

> " The Fines Act Ireland, 1851, 14 & 15 Vict., c. 90,
> " *the application of which is general*, provides (by s. 9)
> " a right of appeal to quarter sessions in all cases
> " where there is an order of justices for payment of
> " any penalty exceeding 40*s*. Whether such appeal
> " is a full right of appeal, or is limited to the question
> " of the amount of the penalty, is doubtful . . .
> " Such appeal, however, as the section provides for
> " is, it is submitted, in addition to and not in sub-
> " stitution for that prescribed by the particular
> " statute."

On pp. 80 and 81 the author deals specifically with the procedure and penalty in customs cases and completes his reference to them by saying :—" There " is no right of appeal unless such as is given by the " Fines Act (I.), 1851, noted post p. 138, or by case " stated on a point of law under 20 and 21 Vict., c. 43." Nothing could be clearer than this expression of opinion that a right of appeal exists in customs cases under the Fines Act. It is true that subsequently in his work (at p. 138) the author, referring to section 9 of the Fines Act, says that it would be difficult to conceive a section more obscure, and that neither the right of appeal nor the procedure was very clear. The difficulties, however, to which he there refers are not as to the general application of the right of appeal, but as to its nature and extent, and in particular as to whether it gives a right to reverse the justices' order

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or merely to reduce or remit the fine. After expressing the view, in which I respectfully concur, that the appeal given by the Fines Act is limited to an appeal for the reduction or remission of the penalty, and that no power is given under it to reverse a conviction, he re-affirms his view as to the general application of the appeal section of the Fines Act in the following words: "In cases, therefore, where payment of a penal sum "exceeding forty shillings is ordered, an appeal may be "taken, whether the case is or is not within the Petty "Sessions Act, under the Fines Act."

Now what are the arguments addressed to us by or on behalf of the Attorney-General as against the general application of section 9. One of these is that, when the section refers to "any such penal sum as "aforesaid," these words are to receive in that section a more limited interpretation than they bear in any other section of the Act, and that they are to be construed as referring only to those penalties for non-observance of the provisions of the Act which are mentioned in the preceding section (Section 8). Any such construction should only be adopted under clear compulsion of the language employed, which certainly does not exist in the present case; and it is further negatived as the proper construction by the express reference to fines upon jurors which do not come within the provisions of section 8.

In the next place, it is argued that the express reference in the section to the appeal being "subject "in all respects to the provisions of the Petty Sessions "Act" necessarily imports section 42 of that Act, and therefore excludes customs cases from its scope. In my opinion, however, this reference to the Petty Sessions Act is in matters of procedure only, as it is only "such appeal *when made*" that is subject to the provisions of the Petty Sessions Act. The right to appeal is not to be determined by the provisions of that Act.

Another argument advanced against the construction of a general right of appeal is that it would lead to certain anomalies. I recognise the weight of this argument, though the existence of anomalies in the

construction of certain statutes is not uncommon and is certainly not as serious a matter as the existence of inconsistencies or repugnancies. Moreover, as Mr. McGonigal pointed out, we do not escape anomalies by giving section 9 of the Fines Act the limited construction contended for by the Attorney-General. We merely substitute one anomaly for the other. It may be, as the Attorney-General says, that it is an anomaly that a limited right of appeal under the Fines Act should exist in customs cases in Ireland during the period that none existed in England; but it would be equally an anomaly that the changes in regard to the application of the Summary Jurisdiction Acts to customs cases effected by the Summary Jurisdiction Act, 1879, section 53, and in regard to the right of appeal to Quarter Sessions conferred by section 37 of the Criminal Justice Administration Act, 1914, should have been made in England without corresponding changes being effected in Ireland. There is also in this legislation the further anomaly that, though upon the Attorney-General's argument there is no appeal from the justices to Quarter Sessions, yet if the same matter were brought by information at the suit of the Attorney-General in the High Court it could proceed to the House of Lords. A further alleged anomaly is that it is not conceivable that Parliament should have intended that a right to reduce fines should be conferred upon a Court of Quarter Sessions, as the Commissioners of the Treasury possess this power, formerly under section 209 of the Customs Consolidation Act, 1876, and now under section 35 of the Inland Revenue Regulation Act, 1890, as applied by the Excise Transfer Order, 1909. It is contended that such twofold jurisdiction might lead to conflicting results; but in my opinion no real difficulty could arise when one of the parties on whom the right to reduce fines is conferred is the party entitled to receive them. The Commissioners would be required to recognise any order of the Court of Quarter Sessions which reduced the fines, but it would be competent for them in the exercise of their discretion to make a further reduction if they thought proper. Moreover, I do not consider

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that powers granted to the Commissioners in 1876 or 1909 can limit or affect those conferred upon the justices in 1851, or that they can even be relied upon for the purpose of interpreting the intention of the legislature at that date.

In my opinion, therefore, the decision of the King's Bench Division should be affirmed with costs.

BEST, L.J.: John Sherry, the prosecutor in the title hereof named, was charged in four separate informations laid and exhibited against him by Charles F. W. Marshall, one of His Majesty's Officers of Customs and Excise, with the commission of certain offences connected with the importation from the Irish Free State into Northern Ireland of eight uncustomed cattle and was convicted thereof by the Justices on the 20th day of March, 1934.

The present appeal relates to one only of the convictions, viz., that whereby it was adjudged that the said John Sherry within three years now last past was at Mullinavanogue, County Fermanagh, on the 14th day of March, 1934, knowingly concerned in harbouring certain uncustomed goods, to wit, eight cattle imported from the Irish Free State into Northern Ireland contrary to section 186 of the Customs Consolidation Act, 1876, and whereby it was further adjudged that the said John Sherry for his said offence should forfeit and pay the sum of two hundred and four pounds, and if the said sum of two hundred and four pounds should not be paid within one month from the said 20th day of March, it was ordered that the said John Sherry should be imprisoned in His Majesty's gaol in Belfast for the period of six months unless he sooner pay the said sum of two hundred and four pounds.

Notice of intention to appeal from the said order to the Quarter Sessions to be held at Enniskillen on the 16th day of April, 1934, was duly served, and the appeal came on for hearing before the learned County Court Judge of Fermanagh, who, having had the case fully argued before him, took time to consider the matter and delivered judgment at the June Quarter Sessions to the effect that in his opinion no appeal lay.

On the 29th day of June, 1934, a conditional order for a writ of mandamus was granted by the Lord Chief Justice directed to the County Court Judge commanding him that unless cause be shown to the contrary he do enter continuance upon and do proceed to hear and determine according to law the appeal from the said order of the Justices.

Cause having been shown, the matter was heard by a Divisional Court, consisting of the Lord Chief Justice and Mr. Justice Brown, who held that the County Court Judge, sitting as Chairman of Quarter Sessions, was wrong in declining jurisdiction, and that he had jurisdiction to hear the appeal. They thereupon disallowed the cause shown and made absolute the conditional order for mandamus.

From this judgment His Majesty's Surveyor of Customs and Excise at Enniskillen and His Majesty's Commissioners of Customs and Excise have appealed.

The appeal having come on for hearing, Mr. McGonigal on behalf of John Sherry raised the preliminary point that as this is a criminal cause or matter, no appeal lies from the judgment of the High Court, and, accordingly, we first heard the arguments of Counsel on this point.

If the judgment in question be a judgment in a criminal cause or matter, there is no jurisdiction in this Court to hear the appeal as the determination of the matter by the King's Bench Division of the High Court is final and without appeal. This follows from the provisions of section 50 of the Supreme Court of Judicature Act (Ireland), 1877, 40 and 41 Vict., c. 57, and from sections 21 and 18 of the Criminal Appeal (Northern Ireland) Act, 1930, 20 and 21 Geo. 5, c. 45, the former of which by sub-section (4) repeals the said section 50 and the latter of which provides that "except as provided by this Act, no appeal shall lie "from any judgment of the High Court in any criminal "cause or matter."

In the course of his submission that no appeal lies to this Court, Mr. McGonigal cited a number of authorities and these, he says, establish the broad principle that if proceedings taken before the justices or elsewhere

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may end in imprisonment, they must be regarded as proceedings in a criminal cause or matter, with the result that the jurisdiction of this Court to hear an appeal from the High Court in respect thereof is ousted. He relied particularly upon Lord Esher's statement of the law in *Ex parte Woodhall* (1). At p. 835 the M.R. says: "The result of all the decided cases is to show "that the words 'criminal cause or matter' in section "47 of the Judicature Act, 1873" (which corresponds with section 50 of the Irish Judicature Act, 1877) "should receive the widest possible interpretation. "The intention was that no appeal should lie in any "'criminal matter' in the widest sense of the term, "this Court being constituted for the hearing of appeals "in civil causes and matters." The Master of the Rolls then goes on to discuss two of the cases, *Reg. v. Fletcher* (2), and *Reg. v. Steele* (3), which Mr. McGonigal put in the forefront of his argument, and arrives at the conclusion that the decision of the Queen's Bench Division in the case then under consideration was given in a criminal cause or matter and that no appeal lay.

To similar effect is *Seaman v. Burley* (4), in which it was held that a judgment upon a special case stated by justices on an application to enforce payment of a poor rate by warrant of distress is a judgment in a criminal cause or matter within section 47 of the Judicature Act, 1873, inasmuch as the proceedings before the justices may end in the imprisonment of the person in default; and therefore an appeal will not lie to the Court of Appeal from the judgment of the Queen's Bench Division in such a case. The argument that proceedings are to be regarded as in a criminal cause or matter if they may result in imprisonment is of too sweeping a character and is not, in my opinion, one which ought necessarily to be yielded to. This was the view of Buckley, L.J., in the case of *Seldon v. Wilde* (5), where at page 707 he says: "Imprisonment is no test of whether proceedings "are criminal. Imprisonment is (or as I should myself

(1) 20 Q.B.D. 832.
(2) 2 Q.B.D. 43.
(3) 2 Q.B.D. 37.
(4) [1896] 2 Q.B. 344.
(5) [1911] 1 K.B. 701, 707.

" prefer to say, may be) a means employed by the " Court to enforce its order in purely civil proceedings."

Mr. McGonigal also referred to and relied upon the two conditions laid down by Viscount Cave in the case of *Clifford and O'Sullivan* (1), which supply the test as to whether or not a matter is to be considered criminal. These conditions will be found on page 580 of the report. The matter to be criminal must (*a*) involve the consideration of some charge of crime, that is to say, of an offence against the public law, and (*b*) that charge must have been preferred or be about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. If these conditions are fulfilled the matter may be criminal even though it is held that no crime has been committed or that the tribunal has no jurisdiction to deal with it, but there must be at least a charge of crime (in the wide sense of the word) and a claim to criminal jurisdiction.

Accepting, as I must and respectfully do accept, these tests, I am unable to see that they apply to the proceedings before the justices. No one looking at the information exhibited in the particular case with which we are dealing could fairly say that there is a charge of crime made in it because the substance of the complaint is that John Sherry has by his conduct forfeited a sum of money for which the Commissioners have elected to sue, and to argue that there is a claim to criminal jurisdiction by the justices because they adjudicate on a complaint of this nature appears to me to beg the question.

Neither the cases to which reference has been made nor any of the others cited by Mr. McGonigal dealt with revenue matters, and the question whether proceedings for the recovery of penalties in customs cases are to be considered proceedings in a criminal cause or matter must depend upon the construction of the Statutes under which the proceedings are taken. In solving this question it should be borne in mind that in the Customs Consolidation Act, 1876, where the legislature clearly desired to make an Act criminal

(1) [1921] 2 A.C. 570.

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it said so ; see, *e.g.*, sections 190 and 193, the former creating a misdemeanour and the latter a felony. These sections indicate that the creation of crimes as distinct from the enforcement and collection of penalties was present to the mind of the legislature.

Let us consider, then, the section under which the proceedings have been brought, section 11 of the Customs and Inland Revenue Act, 1879, which has taken the place of section 218 of the Customs Consolidation Act, 1876, and find out its scope and purpose from the provisions taken as a whole. The duties, penalties, etc., are to be recovered by action, information or other appropriate proceeding in the High Court of Justice in England or by action of debt, information or other appropriate proceeding in the Superior Courts of common law at Dublin . . . in the name of the Attorney-General for England or Ireland respectively . . . or of some officer of Customs or Excise, or by information in the name of some officer of Customs or Excise before one or more Justice or Justices in the United Kingdom.

Now apart from authority I should have thought that the reasonable construction to be put upon the language of the section is that proceedings to be taken in the name of the Attorney-General for England or Ireland, respectively, or of some officer of Customs and Excise in the High Court of Justice in England or in the Superior Courts of common law at Dublin must be civil, not criminal, proceedings. Under the powers given by this section it would have been open to the Attorney-General for Ireland or to an officer of Customs and Excise to bring an action of debt for the duties, penalties, etc., in the Court of Common Pleas at Dublin if the acts complained of had occurred while such a Court was still in existence, and I fail to see how it could be successfully contended that such proceedings, if brought there, were proceedings in a criminal cause or matter. In this connection section 5 of the Customs, Inland Revenue and Savings Bank Act, 1877, 40 Vict., c. 13, is not to be lost sight of ; it provides that in all informations, prosecutions, suits, or proceedings at the suit of the Crown under the

Customs Acts the same rule as to costs shall be observed as in suits or proceedings between subject and subject, which is a strong indication of the intention of the legislature that the proceedings in question should be regarded as of a civil and not of a criminal nature. Again, it is by action of debt, information, or other appropriate proceeding in the Superior Courts of common law at Dublin that the duties, etc., may be sued for, prosecuted, determined and recovered. The words "action of debt" are words specially apt for describing civil proceedings; they cannot, in my opinion, properly be applied to proceedings in a criminal cause or matter. Further, it is provided by section 259 of the Act of 1876 that if in any prosecution . . . for recovering penalties under the Customs Acts any dispute shall arise whether the duties of customs have been paid . . . the proof thereof shall be on the defendant in such prosecution, and where any such proceedings are had in the High Court of Justice on the Revenue side, the defendant shall be competent and compellable to give evidence. To enact that the defendant shall be *compellable* to give evidence appears to indicate very clearly that the proceedings are not regarded as being in a criminal cause or matter, for whilst defendants are now competent to give evidence in criminal cases I have present to my mind only one instance in which they are compellable to do so.

That instance or exception arises under the Evidence Act, 1877, 40 and 41 Vict., c. 14, the first and only section of which provides that on the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant, shall be admissible witnesses and compellable to give evidence.

This enactment is still in force, for section 5, subsection (1), of the Criminal Evidence Act (Northern Ireland), 1923, 13 and 14 Geo. V, c. 9, provides that nothing in the Act shall affect the Evidence Act, 1877.

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Proceedings of the kind mentioned in this latter Act had, however, before the passing of the Act been regarded as in substance of a civil nature, as appears from the case of *The Queen v. Stephens* (1), so that the exception is more apparent than real.

I think, therefore, apart from authority, that proceedings under section 11 of the Act of 1879 brought in the *High Court* are not proceedings in a criminal cause or matter.

But the point is not without authority. In the *Attorney-General v. Radloff* (2), the four Judges who formed the Court were equally divided on the question whether a proceeding on the revenue side of the Court of Exchequer for the recovery of a penalty in the name of the Attorney-General was a criminal proceeding—two (including Baron Martin) holding that it was not, and the other two holding that it was.

In the *Attorney-General v. Bradlaugh* (3), Brett, M.R., referring to the case of the *Attorney General v. Radloff* (2), says he will not go into the reasons given by the eminent judges who decided it but says that if he had been a member of the Court at that time, he should have seen no answer to the reasoning of Martin, B., and should have been of opinion that an information for a penalty on the revenue side of the Court of Exchequer could not at any time, unless there were special and clear words in an Act of Parliament saying it was so, be considered as a criminal proceeding. The judgment of Brett, M.R., in the *Attorney-General v. Bradlaugh* (3), appears generally to have been subsequently accepted as a correct statement of the law, and in particular a passage from it is cited and adopted by Viscount Cave in the case already referred to of *Clifford and O'Sullivan* (4), so that the judgment appears to have the approval of the House of Lords.

Further, in the case of the *King v. Hausmann and Others* (5), it was decided by the Court of Criminal Appeal in England that proceedings on the revenue side of the King's Bench are not criminal

(1) L.R. 1 Q.B. 702, 708.
(2) 10 Ex. 84.
(3) 14 Q.B.D. 667, 688.
(4) [1921] 2 A.C. 580.
(5) 3 Cr. App. R. 3.

matters to which the Criminal Appeal Act of 1907 can apply. Lord Alverstone, L.C.J., at p. 5 says: "We "agree with Brett, M.R., in the *Attorney-General v.* "*Bradlaugh* (1), that proceedings on the revenue side "to recover penalties for smuggling are not criminal "proceedings, and therefore they do not come within "the jurisdiction of this Court."

I arrive, therefore, at the conclusion, both on principle and from authority, that proceedings taken in the name of the Attorney-General or in the name of an officer of Customs, such proceedings being in the High Court, are not proceedings in a criminal cause or matter so as to oust the jurisdiction of the Court of Appeal to hear an appeal in respect thereof.

Now can it be said that different considerations should apply because proceedings have been instituted by an Officer of Customs and Excise, not in the High Court, but before the justices? I do not think it can, because if it were the fact that proceedings brought by such an officer before justices are proceedings in a criminal cause or matter, but when brought by him in the High Court are no longer such, the object of the proceedings in each case being precisely the same, viz., to recover sums forfeited to His Majesty, the result would be that the officer or his superiors, the Commissioners of Customs and Excise, could, by his or their arbitrary choice of the Court in which to sue, determine the nature of the proceedings to be criminal or civil. This is a construction which I decline to put upon the section unless compelled to do so by clear and unambiguous language.

On this branch of the case the observations of Baron Martin in the *Attorney-General v. Radloff* (2), may, with the necessary modifications, be appropriately applied; it is inconsistent, he says, with the true view of the criminal law to say that by proceeding in one form rather than in the other he (in that case the Attorney-General, in this case the officer of Customs and Excise) under the same circumstances can make in the one case that a crime which in the other can only be treated as a debt.

(1) 14 Q.B.D. 688. (2) 10 Ex. 84, 98.

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I accordingly have come to the conclusion that the preliminary point fails and that this Court has jurisdiction in the matter.

The preliminary point having been disposed of, the question for decision in the case is whether the learned County Court Judge was right in holding that no appeal lay to him from the decision of the justices.

The solution turns upon the construction of section 9 of the Fines Act (Ireland), 1851, the learned Attorney-General submitting on the one hand that appeals under this section lie only when certain classes of fines, viz., those which may be inflicted in connection with the administrative work of the Courts, have been imposed, and Mr. McGonigal on the other hand contending that the right of appeal is general and applies to all fines and penalties, howsoever imposed.

Mr. McGonigal relies upon the preamble to the Act, which has been repealed but may be looked at for the purpose of showing the scope of the Act, and which recited that it is expedient to make provision for the better collection and application of fines, penalties, issues, amerciaments and forfeited recognizances in Ireland. He says that these words are wide enough to cover the penalty inflicted in the present case and he relies upon the expressions "such penal sums as "aforesaid" or "such penal sum as aforesaid" used in various sections of the Act as justifying the construction which he asks us to put upon section 9.

The question for decision is not whether that section gives the right of appeal in all cases where fines, penalties, etc., have been imposed by justices, but whether the right of appeal given by the section applies where justices have ordered, as in these proceedings, payment of a sum forfeited to the Crown by a person who has brought uncustomed goods from the Free State into Northern Ireland contrary to the provisions of section 186 of the Customs Consolidation Act, 1876.

The Fines Act in operation prior to 1851 was the Fines and Penalties (Ireland) Act, 1843, 6 & 7 Vict., c. 56.

That Act applied to *all* fines, penalties, etc., and by section 34 it was provided that nothing in this Act

contained shall be deemed or construed to extend to any fine, penalty or forfeiture incurred by or imposed upon any person whatsoever in Ireland under any Act or Acts relating to the Revenues of Customs or Excise, etc. . . . but that all and every such fines, etc. . . . shall be sued for, etc. . . . in the same manner in every respect as if this Act had not been passed.

By this section all matters relating to the Revenues of Customs or Excise were expressly excluded from the operation of the Act. Fines, etc., relating to these Revenues could not be sued for under the Act nor could an appeal be taken against their imposition.

The Fines Act of 1851 can scarcely be said to be as wide in scope as that of 1843 since this latter applies to *all* fines, penalties, etc., whilst the Act of 1851 applies to fines, penalties, etc., without the "all."

On the day on which the Fines (Ireland) Act, 1851, (c. 90), received the Royal Assent, two other Acts, viz., the Summary Jurisdiction (Ireland) Act (c. 92) and the Petty Sessions (Ireland) Act (c. 93), became law. The first two of these Acts deal mainly, though not exclusively, with jurisdiction, and the third almost entirely with procedure or the machinery by which such jurisdiction is to be exercised. I think that the three Acts must be read and construed together as forming a code. Without deciding in favour of the limited construction sought to be put upon section 9 of the Fines Act of 1851 by the Attorney-General, I think his submission that it does not apply to customs matters is well founded.

Section 24 of the Petty Sessions Act makes provision for appeals in certain Summary Jurisdiction cases and prescribes the conditions under which those appeals are to be prosecuted, but section 42 provides that nothing in this Act shall extend or be construed to extend to any information or complaint or other proceeding under or by virtue of any of the Acts relating to Her Majesty's revenues of Excise or Customs . . . except that all proceedings as to the same may be in the forms of procedure required by this Act or as near thereto as the circumstances of the case will admit.

I think the plain meaning of section 42 in its application to His Majesty's revenue of Excise or Customs is

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that, whilst the Petty Sessions Act machinery may be used in revenue cases, nothing in the Act, as, for example, the right of appeal given in section 24, shall apply to such cases. In fact, the section substantially re-enacts the provisions of section 34 of the Fines and Penalties (Ireland) Act, 1843.

This latter section excluded Custom cases from the operation of the Act; the Fines Act of 1851 is silent as to fines, penalties and forfeitures in customs cases, but by section 42 of the Petty Sessions Act taken in conjunction with section 24 of the same Act, they are excluded from being the subject matter of appeal whilst matters of procedure in respect of them are saved.

Mr. McGonigal was forced to admit that if an appeal lay under section 9 of the Fines Act in customs cases to the Court of Quarter Sessions, the latter would have no power to consider the validity of the conviction or to deal with the conviction in any way, and that its functions would be confined to reducing or remitting the penalty. The position then would be this, that the justices are empowered to decide that an offence has been committed and to convict for such offence, and must, without any exercise of discretion on their part, award the penalty sued for, whilst the Court of Quarter Sessions on appeal is debarred from adjudicating on the question whether an offence has in fact been committed but has complete freedom as to the amount of the penalty to be exacted.

But the matter of mitigation or remission does not rest here.

By section 209 of the Act of 1876 the power to mitigate or remit penalties was conferred upon the Commissioners of the Treasury or Customs. That section has been repealed and by the combined effect of section 35 of the Inland Revenue Regulation Act, 1890, and the Excise Transfer Order, 1909, full power to mitigate or to remit entirely is given to the Commissioners of Customs and to the Treasury.

I cannot think that a construction of section 9 is reasonable which authorises the Court of Quarter Sessions to mitigate or remit the penalty, provision

for doing this being amply secured by the powers vested in the Commissioners of Customs and in the Treasury, and at the same time admittedly does not give that Court the right to decide whether the person charged has or has not in fact committed an offence. I know of no example, and none has been brought to our notice, of an appeal which is neither an appeal proper nor yet a re-hearing but is merely of such a nature as to enable, and to do no more than enable, the appellate Court to exercise a discretion which was not conferred upon the Court of first instance.

Further, I would ask what is to happen if the Commissioners mitigate to one sum and the Court of Quarter Sessions mitigate to a different sum or entirely remit the penalty ?

One further consideration which indicates that the Fines Act was not intended to apply to customs cases arises from the application of the fines : section 13 of the Act allows the Court to award any sum not exceeding one-third of the penalty to the prosecutor or informer whilst section 32 of the Inland Revenue Regulation Act, 1890, empowers the Commissioners to reward any person who informs them of any offence against any Act relating to Inland Revenue, or assists in the recovery of any fine or penalty, provided that a reward exceeding fifty pounds shall not be paid in any case without the consent of the Treasury.

Whatever be the scope of the Fines Act of 1851, I am clearly of opinion that it gives no right of appeal to the prosecutor in these proceedings and that the decision of the learned County Court Judge to this effect is right and should be affirmed. My view is that the cause shown should be allowed and the order of the King's Bench Division making absolute the conditional order of mandamus should be discharged, and that the appellants should have the costs of the proceedings in the King's Bench and in this Court.

MEGAW, J. : Whilst the determination of the matters involved in this appeal as a whole presents features of considerable difficulty, I confess I have felt more perplexity as regards the preliminary point raised by

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Mr. McGongial affecting our jurisdiction to entertain an appeal from the High Court than as regards the subject matter of the appeal.

Replacing section 50 of the Judicature Act, 1877, section 18 of the Criminal Appeal (Northern Ireland) Act, 1930, enacts that except as provided by that Act no appeal shall lie from any judgment of the High Court in any criminal cause or matter. There is no exception in the Act affecting such a matter as the present, and we are consequently faced with the net point whether the proceeding before the justices under section 186 of the Customs Consolidation Act, 1876, is a criminal cause or matter.

That the defendant John Sherry acted in contravention of this section is not in dispute, and he through his Counsel contends that he has been convicted of a crime. In the section itself the infringement of the law is described as an offence and in its closing words the section enacts that every person committing such offence "shall forfeit either treble the value of the "goods . . . or £100 at the election of the Com- "missioners of Customs, and the *offender* may either "be *detained* or proceeded against by summons."

It is worthy of note that in the nomenclature of the section the transgressor of the law is designated as "offender" and the word "detained" is used and not "imprisoned." If I could approach the case unembarrassed with decided cases, I should not think that the contravention of the Customs law alleged in the present case was a criminal cause or matter within the meaning of the Judicature Act or the Criminal Appeal Act (Northern Ireland). The authorities, however, have gone very far as to the extent of the field covered by these words.

Probably some confusion arises in the cases cited over the use of the word "penalties." The word really has two different applications. A penalty may be a penal sum such as occurs from the breach of a condition on a bond. It would be straining language to style proceedings to recover such a penalty as criminal. A penalty also may be used in the sense of a sanction for crime. In considering the cases care must be taken

not to confuse these different meanings. Certainly I do not think that its use in the statutes we are considering necessarily imports criminality. Failure to affix a twopenny stamp to a receipt for money paid in certain cases involves a penalty. A penalty is incurred if an unstamped or unsufficiently stamped contract is put in evidence; but I do not think it could be contended that the derelictions visited by these penalties are criminal causes or matters. Indeed, it has been expressly decided in *The Queen v. Kerswill* (1), that the use of the words " to be recovered as a penalty " in an Act of Parliament does not alter the nature of the obligation created by the Act and does not necessarily import criminality. In considering whether any particular breach of the law is criminal, the authorities lay special stress on the point whether a conviction will or *may* result in imprisonment, and the stage at which imprisonment may be ordered is often referred to in the decisions. From a review of these I am disposed to think that there is a point of demarcation indicated which gives the criterion as to whether a matter before the Courts is to be regarded as a criminal cause or matter.

Liability to imprisonment for an offence is not an absolute test of criminality within the statute we are considering, but it is a factor of very considerable importance. Apart from the case of contempt of Court where the legal sanction has its origin in a very exceptional jurisdiction I am disposed to think that a satisfactory and convenient criterion conformable to reported cases, may be found in determining the question at issue, viz.:—Whether as regards any infraction of the law imprisonment can be imposed as a primary sanction either as the sole sanction or as alternative to a fine.

This deduction seems to me to receive some support from the definition of " crime " given in The Conspiracy and Protection of Property Act, 1875, section 3, which reads: " A crime for the purposes of this section means " an offence punishable on indictment, or an offence " which is punishable on summary conviction, and for

(1) [1895] 1 Q.B. 1.

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"the commission of which the offender is liable under "the statute making the offence punishable to be "imprisoned either absolutely or at the discretion of "the court as an alternative for some other punish-"ment."

No doubt this section is in terms confined to the enactment with which it deals but the distinction I have referred to is recognised.

We must therefore investigate closely the effect of the orders that can be made by magistrates in such cases as the present.

The penalties mentioned in section 186 of the Customs Consolidation Act, 1876—as affected by sections 11, 12 and 14 of the Customs and Inland Revenue Act, 1879—are the only relief that can be had by the Crown in such cases as the present. It seems to me that when one regards these penalties described as they are in the sections relevant, he is forced to the conclusion that they are treated as civil debts with special statutory facilities for enforcing payment. Nothing in the sections enables the Crown to proceed by way of indictment. A prosecution as the word is generally understood will not lie either at common law or for breach of a statutory enactment. Even where an indictment does lie, it does not follow that the matter with which it is concerned is criminal; *e.g.*, an indictment lies against highway authorities for non-repair of the highway. Yet the highway authorities are not criminals because thay have failed in their duty of repair.

The procedure to be followed to enforce section 186 is given in section 218 of the Customs Act, 1876, as re-enacted by the 1879 Act. That section prescribes that the penalties incurred or imposed by the Customs Acts may be recovered by one or other of three different ways so far as Ireland is concerned: by action of debt or information in the Superior Courts at the instance of the Attorney-General or of an officer of Customs or Excise, or by information in the name of a Customs or Excise officer before justices.

It seems clear that if the proceedings to exact the penalty for the offence had been brought in a Superior

Court, the matter could not be regarded as criminal. It is contended, however, that as the Revenue authorities have elected to bring the proceeding before the justices, the matter has assumed a different complexion, and has, by reason of the fact that it has been brought at Petty Sessions and not in the High Court, become a criminal cause or matter.

This is a conclusion that I do not think should be made unless it is clear from the Acts of Parliament that the legislature so intended. It does seem incongruous that the legislature should regard the same act as criminal if proceedings are taken in the lower courts but non-criminal if in the higher, and that a person in the position of an officer of Customs would have a dictator's word as to whether the nature of an act was civil or criminal. Some of the authorities referred to in the argument tend to show that such a result must not be ruled out because of its apparent absurdity. There do seem to be instances of cases where criminality or non-criminality depends on the procedure followed, but in my opinion a Court should not so hold in any case unless absolutely forced to do so by authority. Some difficulty arises from section 12 of the Customs Act, 1879, but I do not think that its effect goes further than to put a limit to the term for which an offender may be detained in prison if he does not—in the case of a first offence—pay the penalty on conviction. This is borne out by the statutory form in which the conviction is set out as contained in Schedule C. of the 1876 Act, which is unaltered by the 1879 Act. The conviction, after adapting section 12 of the 1879 Act, would read : " We adjudge the said J. S. for his said " offence to forfeit and pay the sum of £ and if " the said sum of £ be not forthwith paid, we " adjudge the said J. S. to be imprisoned for " months unless he shall sooner pay the sum " of £ ."

The case before us is not one in which imprisonment is the primary sanction. The imprisonment that may follow from a conviction is only a method of enforcing the payment of the statutory penalty, and can only be inflicted till the amount of the statutory penalty is

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paid. It is clearly analogous to the cases dealt with in *Scott v. Scott* (1), such as imprisonment for contempt of court where the imprisonment may continue until the contempt is purged. There is much authority to show that, though imprisonment is awarded for the offence in such cases, they are not criminal matters and may be appealed from.

Being therefore of this opinion, I see a line of distinction between this case and *Seaman v. Burley* (2), the high water mark of the decisions relied on by Mr. McGonigal—and I am of opinion that the authority of *R. v. Hausmann* (3), which is one expressly dealing with Customs cases, prevails. Therefore with considerable doubt I have arrived at the conclusion that the present case must not be regarded as a criminal cause or matter within the section.

In regard to the appeal itself, though the draftsmanship of the statutes leaves much to be desired, I should have little doubt were it not that I am differing from Lord Justice Andrews and the learned judges in the High Court.

I agree so entirely with Best, L.J., in his very closely rendered judgment that I might content myself by saying that I respectfully concur in it.

No matter how the Fines Act and Petty Sessions Act are construed, the wording of section 9 of the Fines Act and section 24 of the Petty Sessions Act result in perplexing considerations. We must in construing these sections look at the state of the law before and after these enactments. Under the Statute Law of 1843, which on the face of it would be the law of the land till the day of the enactment of the Fines, Summary Jurisdiction and Petty Sessions Acts, no such appeal lay to Quarter Sessions as is now contended for. From that date to the present there is no record of any appeal being brought to Quarter Sessions under section 9 of the Fines Act in any Customs case, nor indeed in any case where a minimum penalty was directed by statute.

(1) [1913] A.C. 417.
(2) [1896] 2 Q.B. 344.
(3) 3 Cr. App. R. 3.

Section 42 of the Petty Sessions Act replaced section 34 of the Fines and Penalties (Ireland) Act, 1843, almost in the same words. Section 24 of the Petty Sessions Act, 1851, which in terms excluded customs cases from its purview, gave a general right of appeal in all cases where a penal sum had been awarded exceeding 20 shillings. Section 23 of the Summary Jurisdiction Act, 1851, gives a corresponding right of appeal for cases falling under its provisions. In my opinion the three Acts—Fines, Summary Jurisdiction and Petty Sessions Acts—must be read together as one code. I think that if the legislature had intended to alter the existing law as regards appeals in customs cases it would have done so in more definite language. I do not think that it was ever intended that justices at Quarter Sessions should have power to reduce or mitigate statutory minimum penalties, and this power would exist if the argument for the respondent is sound. Such legislation would certainly be a very roundabout way of providing for the reduction or mitigation of all statutory minimum penalties, and the respondent's argument necessarily involves that this section should apply generally. This would entail the almost ludicrous consequence that while the legislature has been year after year since 1851 enacting minimum penalties to follow magisterial convictions, such legislation with its considered and defined penalties could be rendered abortive by magistrates sitting at Quarter Sessions by virtue of section 9 of the Fines Act. However, for eighty years no one has had the courage or the perspicacity to invoke the section in such cases.

It is not necessary for us in the present proceedings to pronounce as to the construction of section 9 in other cases than that before us. Its relationship to section 24 of the Petty Session Act and section 23 of the Summary Jurisdiction Act presents some awkward problems, but it would be strange that when general rights of appeal were given by the two last-mentioned Acts, the curiously worded right of appeal given by section 9 of the Fines Act should be introduced as a collateral right affecting all cases whether made the

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subject of appeal in the Summary Jurisdiction and Petty Sessions Act or not.

I do not think that it was intended to introduce such a sweeping change in the pre-existing law as is contended for by the appellants. The reference to the Petty Sessions Act in section 9 of the Fines Act, in my opinion, extends farther than to procedure. The widest application which it seems possible to give to section 9 of the Fines Act is that it extends to cases where penalties are imposed by the Summary Jurisdiction Act and the Petty Sessions Act plus those specially mentioned in the Fines Act. Under the Petty Sessions Act the jurisdiction as to customs, with the penalties incident thereto, is excluded except as regards procedure, and no penalties affecting customs are imposed by the Fines Act or the Summary Jurisdiction Act. Consequently, having formed such an opinion, I must hold that no appeal for mitigation or reduction of a fine to magistrates at Quarter Sessions lies.

I agree entirely with the admirably expressed decision of the learned County Court Judge.

Solicitor for the prosecutor: *John G. Magrath.*
Solicitor for the Commissioners of Inland Revenue: *Chief Crown Solicitor.*

J. McC.

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COMPANY—Policy of Assurance—Asset of Company—Overdraft *from Bank—Estoppel—Deposit of Policy as collateral security—Legal assignment of policy to Bank by Directors as individuals to secure personal liabilities—Subsequent order for compulsory winding up—Whether Bank entitled to retain policy to meet Overdraft of Company—Companies (Consolidation) Act*, 1908 (8 *Edw. 7, c. 69*) *s.* 137. On 12th January, 1905, Thomas Wilson and William Reid, who were then trading in partnership as Wilson and Reid, effected a policy of assurance on their joint lives, payable on the death of either of them, for £750 with profits. This formed part of the partnership assets. On 7th September, 1917, the partnership was formed into a limited company and on 18th October, 1917, the policy, among other things was transferred to the company and notice of the assignment duly served on the Assurance Society. Wilson and Reid Limited was a private company and its only shareholders were the said Thomas Wilson, the said William Reid, who were directors, Thomas Wilson being also the secretary of the company. In August, 1922, an overdraft for one year was sanctioned by the Ulster Bank on a loan guarantee of £10,000 by the company and this guarantee was secured by collateral securities of the private property of the said Thomas Wilson and William Reid. Included as collateral security was an item which was entered in the minute of the directors of the bank as "also jointly—Policy £750 in their joint names not assigned." The policy for £750 was held by the bank as a deposit and was entered in the books of the bank as an item of security under the

heading Wilson & Reid, Ltd. "Held as it is without assignment or notice to the company." The deposit was also entered as security for the said Thomas Wilson's personal account. At the time of making the deposit of the policy for £750 the bank had no knowledge that it had been assigned to Wilson and Reid, Limited. On 24th July, 1929, a legal assignment of the policy for £750 was made by Thomas Wilson and William Reid in their individual capacities to the bank not to secure the account of Wilson and Reid, Limited, but the accounts jointly, and severally of Thomas Wilson and William Reid. Notice of assignment was given by the bank to the Assurance Society. The bank received a letter informing it of the previous assignment of the policy for £750 to Wilson and Reid, Limited. Thomas Wilson died on 17th November, 1930, and on 5th December, 1930, Wilson and Reid, Limited, passed a resolution for voluntary winding-up; but an order for compulsory winding-up was subsequently made by the Court. *Held*, by Megaw, J., that the bank received and held the policy for £750 as a guarantee by Thomas Wilson and William Reid personally and not as a deposit on behalf of the company under the powers given by the articles of association; and that the possession of the policy by the bank did not create any right against the company. *In re Companies (Consolidation) Act, 1908, and In re Wilson & Reid, Ltd.*
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CUSTOMS—HARBOURING *cattle unlawfully imported from Irish Free State—Appeal—Jurisdiction—"Criminal Cause or Matter"—Whether Appeal lies from decision of Justices to Court of Quarter Sessions—Fines Act (Ireland), 1851 (14 & 15 Vict., c. 90) section 9—Petty Sessions Act (Ireland), 1851 (14 & 15 Vict., c. 93) section 42—Penalty.* On an information laid by an officer of the Customs and Excise against the prosecutor, J. S., for being knowingly concerned in harbouring certain uncustomed goods, viz., eight cattle imported from the Irish Free State into Northern Ireland, contrary to section 186 of the Customs Consolidation Act, 1876, whereby the prosecutor had forfeited the sum of £204, being treble the duty paid value of the goods, for which the Commissioners of Customs had elected to sue. The prosecutor was convicted and adjudged for his offence to forfeit and pay the sum of £204 and the order further provided that if the said sum of £204 was not paid within one month the prosecutor should be imprisoned for six months unless he sooner paid the sum of £204. The prosecutor appealed from the Justices' order to the County Court Judge sitting as Chairman of Quarter Sessions who delivered judgment to the effect that no appeal lay. A conditional order for a writ of mandamus was granted by the Lord Chief Justice directed to the County Court Judge, sitting as Chairman of Quarter Sessions, commanding him that unless cause be shown to the contrary he do enter continuance and do proceed to hear and determine according to law the appeal from the order of the justices. Cause having been shown the matter came before the King's Bench Division, consisting of Moore, L.C.J., and Brown, J., who held that the County Court Judge, sitting as Chairman of Quarter Sessions, was wrong in declining jurisdiction, and that he had jurisdiction to hear the appeal. They disallowed the cause shown and made absolute the conditional order for mandamus. The Commissioners of Customs and Excise appealed to the Court of Appeal. At the hearing before the Court of Appeal the preliminary point was taken on behalf of J. S. that no appeal lay from the Court of King's Bench to the Court of Appeal on the ground that this was a criminal cause or matter. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.,

and Megaw, J., *dubitante*) that proceedings taken before the Justices in the name of an officer of Customs are not proceedings in a criminal cause or matter so as to oust the jurisdiction of the Court of Appeal to hear an appeal in respect of them. *Held*, also, reversing the King's Bench Division (Moore, L.C.J., and Brown, J.), (Andrews, L.J., dissenting), that the County Court Judge sitting as Chairman of Quarter Sessions was right in holding that no appeal lay to him from the decision of the justices. *R. (Sherry) v. County Court Judge and Chairman of Quarter Sessions for County Fermanagh.* C.A. 211

CUSTOMS—HARBOURING *cattle unlawfully imported from Irish Free State—Jurisdiction of Justices—Certiorari—Power of Superior Court to review finding of justices on collateral issue—Customs Consolidation Act*, 1876 (39 & 40 *Vict.*, *c.* 36), *sections* 186, 259. The prosecutors were convicted at the N. Petty Sessions before the Justices of D. for harbouring certain cattle unlawfully imported from the Irish Free State, with intent to defraud. It was admitted that no evidence had been given before the Justices proving that the cattle had been unlawfully imported but reliance was placed by the Justices on the description of the cattle, and the contradictory statements of the prosecutors. On behalf of the prosecutors it was submitted that they were entitled to a direction, as no evidence had been given that the cattle had been imported. The Justices refused this application and convicted the prosecutors. The prosecutors obtained a conditional order for the issue of a writ of certiorari to remove into the King's Bench Division for the purpose of being quashed the orders made by the Justices. *Held*, by the King's Bench Division (Moore, L.C.J., and Brown, J.), in making the conditional order absolute, that the Justices had no power to make an order convicting the prosecutors of harbouring cattle, unless it was proved that the cattle had been unlawfully imported, and that it was the duty of the Justices before entering on jurisdiction to inquire if the necessary conditions existed to give them that jurisdiction, and their decision and the evidence on which it was based, could be reviewed. They could not by a wrong decision upon a fact collateral to the actual matter which they had to try give themselves jurisdiction which they would not otherwise possess. *Rex (Greenaway) v. Justices of Armagh* ([1924] 2. I.R. 55) followed. *Rex (Peter Magee and Bernard Magee) v. Justices of Down.* [K.B.D. 51

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INCOME TAX—INTEREST PAYABLE ON ADVANCE FROM BANK—*Claim for repayment of tax by guarantor—Refusal*

of claim by Special Commissioners—Whether Appeal by way of re-hearing lay from decision of Special Commissioners to Recorder—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40) *sections* 36, 195, 196, 202—*Finance Act*, 1925 (15 & 16 *Geo.* 5, *c.* 36) *section* 19—*Right of Appeal.* The respondent applied to the Commissioners of Inland Revenue under section 36 of the Income Tax Act, 1918, and section 19 of the Finance Act, 1925, for the repayment of income tax on interest which he claimed to have paid, without deduction of tax, out of profits brought into charge to tax by him as guarantor for an overdraft in the Bank, of certain business concerns. The Commissioners refused the claim and the respondent appealed to the Special Commissioners who also refused the claim. The respondent required the Special Commissioners to list an appeal before the Recorder; this the Special Commissioners refused to do on the ground that the Recorder had no jurisdiction to hear the appeal. The respondent then requested the Recorder to list the appeal and the Recorder provisionally listed it for argument on the preliminary question as to whether or not he had jurisdiction to hear it. The Recorder held that he had juris diction. The Commissioners then obtained a conditional order of prohibition, forbidding the Recorder to hear the appeal, and the case then came before the Court on motion to make the conditional order absolute. *Held*, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that the words in section 19, sub-section (3) of the Finance Act of 1925, that "All "provisions of the Income Tax Acts "relating to such an appeal" do not enable an appeal by re-hearing to be made to the Recorder or County Court Judge and that the conditional order must be made absolute *Commissioners of Inland Revenue, In re Sir Samuel Kelly.* [K.B.D. 162

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POOR-RATE—HOUSE, OFFICES, AND LAND—*Non-user of farm house by owner and occupier—Offices used as agricultural buildings—Occupation—Liability of owner.* The complainant sued the defendant who was the owner of a farm of land for £2 10*s.* 0*d.* Poor Rate for the year ending March 31st, 1934, in respect of the premises consisting of the farm house, offices and land. The defendant contended that he was not in occupation of the farm house and was not liable to pay rates in respect thereof. The Justices held that as the farm house was not used and was unfit to be used as a dwelling house during the year, and as the remaining and separate farm building was occupied and used as an agricultural building solely in connection with the farming operations the defendant was not liable to pay the rates claimed, and they dismissed the summons, but stated a case for the opinion of the King's Bench Division. *Held*, by the King's Bench Division, Brown, J., and Megaw, J., that the Justices were wrong in dismissing the summons, and that as the defendant was in occupation of the whole tenement consisting of the farm house, offices, and land, he was liable to pay the amount claimed in respect of Poor Rate. *Wilson v. Kennedy.* [K.B.D. 185

PRACTICE—DISCOVERY—*Documents—Action by former wife against former husband whom she had divorced—Agreement for settlement—Collusion—Particeps criminis.* In an action for the recovery of the costs of the preparation of a deed of settlement made pursuant to an agreement between the defendant and the plaintiff. The defendant pleaded *inter alia* that the agreement was entered into in pursuance of a collusive bargain made between the plaintiff and the defendant, whereby the defendant agreed to assist the plaintiff in obtaining a divorce by supplying evidence of misconduct to the plaintiff on which proceedings might be maintained, and that he, the defendant, did supply such evidence and assisted the plaintiff to obtain a divorce. The defendant applied by motion for discovery of all documents touching the matters at issue. The Lord Chief Justice refused the motion on the ground that he would not allow the Court to assist the defendant in establishing his own fraud. The defendant appealed to the Court of Appeal. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.), that the Lord Chief Justice's discretion was not in any way fettered and was properly exercised, and that his decision should be affirmed. *Held*, further, that a Court of Justice ought not to assist a party in his attempt to establish his own allegation of his own fraud. *Sumner v. Sumner.* [C.A. 173

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PROBATE—PRACTICE—TRIAL BY JURY—*The Court of Probate Act (Ireland)*, 1857 (20 *& 21 Vict.*, *c.* 79, *section* 41—*Rules of the Supreme Court (Ireland)*, 1905, *Order* 36, *rule* 2. In an action for the revocation of a grant of probate there being serious questions

to be tried as to the testator's testamentary capacity and as to his knowledge and approval of the contents of the will and the assets being substantial. *Held*, by the Court of Appeal, that the plaintiff was entitled to have the action tried by a jury. *Gardiner v. O'Rourke and Others.* [C.A. 205

PROMISSORY NOTE—EVIDENCE IDENTIFYING HANDWRITING *of subscribing witness—Whether signature of Maker of Note proved by proving handwriting of subscribing witness— Common Law Procedure Amendment Act (Ireland)*, 1856 (19 & 20 *Vict.*, c. 102) *section* 29. The plaintiff, as administrator of J. M. deceased, claimed £84 13*s.* 6*d.* balance alleged to be due by the defendants, P. B. & J. B., to the plaintiff on foot of a promissory note, made by the defendants in favour of J. M., deceased. The defendant, P. B., entered no appearance and did not defend. The promissory note bore the signatures of P. B. and J. B., and these signatures were alleged to be the signatures of the defendants. The signatures to the note had been attested. Evidence was given identifying the handwriting of the subscribing witness. Evidence was also given of an arrangement as a result of which J. M. refrained from taking legal proceedings against the defendant J. B. Counsel, on behalf of the defendant, J. B., at the close of the plaintiff's case asked for a direction on the ground that there was no proof of the execution of the note. The trial judge considered that there was sufficient evidence in the absence of any explanation by the defendant who was in Court. He, accordingly, refused to direct, and gave judgment against the defendant, J. B. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.), that the signature of the defendant, J. B., could be properly proved by merely proving the handwriting of the attesting witness, and that the trial judge was right in law in holding that the evidence tendered was sufficient to establish such a *prima facie* case as he was entitled to act upon in the absence of evidence to the contrary. *Keohane v. Byrne.* [C.A. 63

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STATUTORY DUTY—ACTION UNDER STATUTE—*Amount due for wages in lieu of holidays—Penalty—Shop Assistant—Shops Act*, 1912 (2 *Geo.* 5, c. 3) *section* 21 (6) *and Fifth Schedule.* Under section 21, sub-section 6, of the Shops Act, 1912, and the Fifth Schedule thereto, on failure to comply with the provisions of that Schedule, the occupier of the shop is guilty of an offence against the Act and is liable to the penalty therein prescribed. The Schedule provides for an annual holiday for shop assistants without deduction from wages or salary. The plaintiff brought a civil bill claiming the sum of £9 0*s.* 0*d.*, being the amount due by the defendant for four weeks wages in lieu of the holidays which he had not received. The Deputy Recorder of B. gave a decree for £9 0*s.* 0*d.* The defendant appealed to the High Court. *Held*, by Best, L.J., affirming the judgment of the Deputy Recorder that the plaintiff had a right of action for defendant's breach of statutory duty to give him a fortnight's holiday with full pay in each year and that this right was available in addition to the remedy for recovery of a penalty. *Reilly v. Moore.* [K.B.D. 196

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SUCCESSION DUTY—PERSON ASSESSED RESIDING IN ENGLAND—*Whether right of appeal to High Court in England—Whether appeal a stay of Information by the Crown—Time of appeal—Where an appeal lies—"Accountable Party"—"Successor"—Succession Duty Act*, 1853 (16 *&* 17 *Vict.*, *c.* 51) *sections* 1, 2, 5, 7, 10, 12, 42, 44, 45 *and* 50—*Customs and Inland Revenue Act*, 1888 (51 *Vict.*, *c.* 8) *section* 21—*Finance Act*, 1894 (57 *&* 58 *Vict.*, *c.* 30) *section* 1—*Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8) *section* 58 (2) *Proviso* (*a*)—*Government of Ireland Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 67) *sections* 21, 61, 69 (*a*) (*f*) *and* (*g*)—*Government of Ireland* (*Adaptation of the Taxing Acts*) *Order*, 1922, *No.* 80, *Clauses* 3, 11, 12, 13, 14. The defendant, who resided in London, was assessed as an accountable party for succession duty in respect of the cesser of a moiety of an annuity of £2,000, charged upon lands situate in Northern Ireland. He gave notice of his intention to appeal to the High Court of Justice in England under

section 50 of the Succession Duty Act, 1853. *Held*, by the Court of Appeal (reversing the decision of the King's Bench Division) (1) That an appeal under section 50 of the Succession Duty Act, 1853, lies only where the appellant is an accountable party, and the question at issue is merely the question of the amount of the assessment, but does not lie where there is a denial of liability; (2) That notice of appeal under section 50 does not operate as a stay of, or a bar to, the Crown's proceedings by information; (3) That the limitation of time for furnishing a statement of the grounds of appeal under section 50 being statutory cannot be extended. *Held, also*, (Megaw, J.), that there is an implied repeal of section 50 by the Government of Ireland Act, 1920, so far as section 50 gives any appeal to the English Courts over Northern Ireland succession duty. *Held, also*, that the exemption from the payment of the one per centum succession duty payable under the Succession Duty Act, 1853, s. 10, and the additional ten shillings per centum payable under the Customs and Inland Revenue Act, 1888, only arises where estate duty is payable under the Finance Act, 1894, and the principal value of the estate does not exceed £15,000. *Attorney-General v. Jaffe.* [C.A. 97

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TRADE UNION—ACTION FOR TORT *against trustees of trade union—Maintainability of action—Trade Disputes Act*, 1906 (6 *Edw.* 7, *c.* 47) *section* 4, *sub-sections* 1 *and* 2—*Trade Union Act*, 1871 (34 *&* 35 *Vict.*, *c.* 31) *section* 9—*R.S.C. Order* 25, *r.* 4. The plaintiff sued the defendants, their servants or agents, for wrongfully and maliciously (1) inducing certain persons not to work for him; (2) interfering with his lawful trade and business; (3) interfering with certain contracts entered into by him; (4) conspiring to induce certain persons not to work for him and to interfere with his lawful trade and business. The plaintiff alleged that the defendant M. was the servant or agent of the Union. A notice of motion was served on behalf of the trustee defendants for an order that all further proceedings in the action against them be stayed, and that the action should be dismissed on the grounds that it disclosed no cause of action, or, alternatively, no reasonable cause of action against them, and that the proceedings were vexatious and were not *bona fide* brought to obtain any relief against them. It was sworn on behalf of the trustee defendants, and not contradicted, that none of them resided in Northern Ireland, and that none of them committed the acts "in their capacity "as individuals, nor had they, or any "of them, any knowledge of these acts "before the issue of the writ of "summons." It was also sworn, and not contradicted, that the defendant M. was a shop steward in the employment of the Union, and that he was not a servant or agent of the trustees, nor under any duty to them, save so far as they acted officially for and on behalf of the Union. It was also sworn that they did not know the defendant M. and that he had no authority from them to commit the acts complained of. The Lord Chief Justice refused the defendants' motion with costs. The defendants appealed to the Court of Appeal. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.), reversing the decision of Moore, L.C.J., that all further proceedings must be stayed and the action dismissed with costs. The liability imposed by section 4 (1) of the Trades Disputes Act, 1906 (which modified section 9 of the Trade Union Act, 1871), on the trustees of a trade union is confined to matters in which some question is raised directly involving the property real or personal vested in them, and does not extend to cases where the property vested in them has not been instrumental in injuring the plaintiff. *Drennan v. Beechy and Others.* C.A. 74

TRIAL BY JURY—*See* PROBATE 205

WILL—CONSTRUCTION—*Bequest of the use of portion of a farm to M. for life, followed by a gift of the farm to P. and F. —Incumbrance Sub-division without the consent of the landlord in writing—*

Land Law (Ireland) Act, 1881 (44 & 45 *Vict., c.* 49) *sections* 2, 3, 30—*Landlord and Tenant Act (Ireland)*, 1860 (23 & 24 *Vict., c.* 154), *section* 10. B. G., who was the father of P., the defendant, and of M., the respondent, left by his will "to my daughter, M., the use of "the field of land at the lime kiln "during her life, and also one acre of "ground for her use for the same "period, and a sufficient area of "ground in the garden to grow each "year a sufficient supply of cabbage "plants for her own use." He also left "to my sons, P. & F., in equal "portions, my farm of land." The devise to P. & F. of the testator's farm of land included the portions set apart for M.'s use during her life, which were to be equally divided between P. & F. at her death. He also bequeathed to his son F. the room and upstairs of the house (slated) he was residing in, and to his daughter M. he bequeathed the kitchen and upstairs of the house he was residing in, after which it was to become the property of his son F., and he ordered that, with the exception of the stable, which he bequeathed to his daughter M. during her life, afterwards reverting to his sons, P. & F., all the out-offices be equally divided between his two sons, P. & F. F. assigned his interest in the lands to the defendant P. on 13th December, 1919. The defendant having become indebted to the plaintiff in the sum of £30 3*s.* 0*d.* for rent, the plaintiff entered up judgment in the King's Bench Division for that sum, together with costs. The judgment was registered as a judgment mortgage over the defendant's interest in the farm. The plaintiff brought an equity civil bill to have the amount of the judgment mortgage declared well charged on the defendant's lands, and the County Court Judge directed an inquiry as to what incumbrances affected the lands. The Acting Clerk of the Crown and Peace found by his certificate that the gift to M. constituted a burden on the lands. The plaintiff brought a motion before the County Court Judge to vary the certificate by omitting the burden in favour of M. The County Court Judge refused the motion. The plaintiff appealed to the Judge of Assize who held that the bequest constituted a sub-division without the consent of the landlord in writing and came within section 2 of the Land Law (Ireland) Act, 1881, and that consequently it was null and void, but stated a case for the opinion of the Court of Appeal. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.), that the finding that the bequest in favour of the respondent M. was an incumbrance affecting the lands was right in point of law. *Held*, also, that section 2 of the Land Law (Ireland) Act, 1881, which forbids tenants from year to year of tenancies to which the Act applies from sub-dividing their holdings without the consent of the landlord, applies to sub-divisions by will as well as to sub-divisions by assignment *inter vivos*; *Held*, further, that the effect of sections 2 and 3 of the Land Law (Ireland) Act, 1881, when read together, is that sub-divisions by will, as distinguished from attempted sub-divisions *inter vivos* which are absolutely void (*Fogarty v. Shannon* [1896] 2 I.R. 273) are not rendered null and void as between the various parties claiming under the will, but confer upon the landlord the right to acquire a sale of the tenancy in the event of the personal representatives of the testator failing to nominate one of the legatees to succeed to the tenancy. *Poe v. Gillen.* [C.A. 1

WINDING-UP—ASSET 133
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WORK—STRIKE 37
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WORKMEN'S COMPENSATION—EMPLOYER AND WORKMAN—ACCIDENT *arising out of employment—Workman injured while proceeding along road after having turned or "kopped" cattle and at moment of accident turned in direction of footpath—Workmen's Compensation Act (Northern Ireland)*, 1927, 17 & 18 *Geo.* 5, *c.* 16, *section* 1. A workman's duties included the carrying of milk to his employer's customers. On 19th November, 1932, he left the hotel with a can of milk to be delivered to one of the customers. On his way he had to cross the road, and when he was in the "middle" or "centre" of the road, he helped a woman to turn or "kop" some straying cattle, and after having done so, and as he was turning towards the footpath, he was struck by a cyclist and died as the result of his injuries. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.), that the

accident arose out of and in the course of the employment. *Hanna v. Eagleson.* [C.A. 19

WORKMEN'S COMPENSATION—"PARTIAL INCAPACITY . . . RESULTS "*from Injury*"—*Light work at Wages equal pre-accident—Strike—Applicant participates in Strike—Application for re-instatement—No work available as result of Strike—Right to Compensation—Workmen's Compensation Act* (*Northern Ireland*), 1927 (17 & 18 *Geo.* 5, *Ch.* 16), *section* 9 (3). The applicant was formerly employed by the respondents as a roofer. On 31st December, 1921, he was partially incapacitated by an accident which admittedly arose out of and in the course of his employment. He received compensation until 21st May, 1922, when he was given light work by the respondents. He received the same wage as he had formerly been paid as a roofer. He was still engaged upon this work when on 31st January, 1933, a railway strike began against a reduction in the wages payable to certain classes of workers. Applicant was not directly affected by the reduction. He gave ovidence before the Recorder that during the strike there was no work for him to do; but he admitted on cross-examination that he had been directed to do other light work. Evidence was given on behalf of the respondents that the applicant had been warned that consequence of the strike would be a curtailment in the staff of the company. After the strike the applicant applied to the company for re-instatement which was refused on the ground that as a result of the strike there was no work available for him. He was still partially incapacitated. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.), affirming the Recorder of Belfast —(1) That the applicant was not entitled to compensation during the priod of his refusal to work, *i.e.*, during the strike and after the strike up to the time of his application for re-instatement. (2) That he did not finally lose his right to compensation by his refusal to work during the strike. (3) That the fact that the company could not offer the applicant work was due to the strike was immaterial except in so far as it was evidence of a general failure of the labour market for his type of labour. *Beattie v. London Midland and Scottish Railway Co.* (*N.C.C.*) [C.A. 37